Ethnic Conflict and International Law

Group Claims and Conflict Resolution within the International Legal System

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Tina Kempin

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CHR	Commission on Human Rights
COE	Council of Europe
CRC	Convention on the Rights of the Child
CSCE	Conference for Security and Co-operation in Europe
DPKO	Department of Peacekeeping Operations
DRC	Democratic Republic of the Congo
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
EU	European Union
EUFOR	European Union Force in Bosnia and Herzegovina
HCNM	OSCE High Commissioner on National Minorities
HRC	Human Rights Committee
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILO	International Labour Organization
KFOR	Kosovo Force
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization

NGO(s)	Non-governmental Organization(s)
OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
PCIJ	Permanent Court of International Justice
SA	Special Advisor
SFOR	Stabilization Force in Bosnia and Herzegovina (NATO)
SR	Special Rapporteur
SRSG	Special Representative of the Secretary-General
UDHR	Universal Declaration of Human Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNICEF	United Nations Children's Fund
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSAS	United Nations Stand-by Arrangements System
UNSC	United Nations Security Council
UNSG	United Nations Secretary-General
UNTAES	United Nations Transitional Authority in Eastern Slavonia
UNTAET	United Nations Transitional Administration in East Timor
U.S.	United States
WGM	Working Group on Minorities

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Introduction

> There are many countries in our blood, aren't there, but only one person. Would the world be in the mess it is if we were loyal to love and not to countries?
> GRAHAM GREENE, *Our Man in Havanna.*

"When ethnic identity is at stake, international law should have cause to worry."[1] Conflicts in the Balkans, Rwanda, Chechnya, Iraq, Israel/Palestine, Indonesia, Sri Lanka, India, and Darfour are among the deadliest and best-known ethnic conflicts that have shaped international relations over the last 15 years. Provinces, states, and in some cases even whole regions have been destabilized through a wave of ethnic insecurity and violence, often paired with a downward spiral of economic decline and state failure, accompanied by corruption and mismanagement. The early optimism of some that the end of the Cold War would lead to a period of stable peace and international security has quickly shattered.

Despite the fact that the number of ethnic conflicts declined in the past few years, ethnic turmoil is one of the main sources of warfare and insecurity in major regions of the world.[2] Between 1945 and 1990 nearly 100 ethnic groups were involved in violent conflicts. During the 1990s about three-quarters of the conflicts were wars between politically organized ethnic groups and governments. Over one-third of the world's countries were directly affected by serious intrastate warfare at some time during the 1990s and, of these states, nearly two-thirds experienced armed conflicts for seven or more years during the decade.[3] In 2003, 26 of 29 conflicts were internal, most of them including ethnic issues.[4] A CIA report issued in 2000 estimated that many "internal conflicts, particularly those arising from communal disputes, will continue to be vicious, long-lasting, and difficult to terminate – leaving bitter legacies in the wake."[5]

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1 See STEVEN R. RATNER. "Does International Law Matter in Preventing Ethnic Conflict." *NYU Journal of International Law and Politics* 32 (1999-2000): 591-698. 592.

2 See *Minorities at Risk Project*. College Park, MD: Center for International Development and Conflict Management, 2005. http://www.cidcm.umd.edu/inscr/mar/ [accessed June 2006].

3 PETER WALLENSTEEN and MARGARETA SOLLENBERG. "Armed Conflict, 1989-1998." *Journal of Peace Research* 36/5 (1999): 593-606.

4 MIKAEL ERIKSSON, PETER WALLENSTEEN, and MARGARETA SOLLENBERG. "Armed Conflict, 1989-2003." *Journal of Peace Research* 41 (2004): 625-636. 626 and 629.

5 *Global Trends 2015: A Dialogue About the Future With Nongovernmental Experts*. Washington, D.C.: Central Intelligence Agency, December 2000. 49.

Ethnic conflict is a matter of global concern and its consequences cannot be ignored. Almost every state has within its territory a number of minorities of national, ethnic, indigenous, religious, or linguistic character. Ethnic conflicts often involve massive attacks on civilians, especially on the weakest part of the population. Widespread and systematic human rights violations, mass murder, genocide, rape, torture, and expulsions are among the worst atrocities committed during ethnic conflicts. Risks of future genocide and mass murder remain high in a half-dozen countries and a significant possibility in a dozen others.[6] Furthermore, spillover effects of ethnic conflict to nearby regions can include refugee problems, economic disasters, ecological catastrophes, military complications (armament and proliferation), and instability up to interstate war.[7] Of these, refugee flows and displacement are some of the most common problems. *The World Refugee Survey 2005* estimates that 11.5 million people worldwide were refugees and 21.2 million people were internally displaced.[8] Most of these peoples were fleeing civil wars, ethnic conflicts, or campaigns of mass murder and ethnic cleansing.

The international community has frequently failed to react to ethnic conflict and human rights violations. Hopes that the United Nations (UN) would play a more effective role in international relations after the end of the Cold War – reinforced by the successes in the Gulf war in 1991 and the large peace keeping operations in Cambodia and Namibia – were dashed by the inability of the UN to react effectively to the conflicts in the Balkans, Somalia, or Rwanda.

The UN was established in the post World War Two spirit to "save succeeding generation from the scourge of war," namely to maintain international peace and security while promoting a more just world order. However, the challenges the UN faces today are different than those the organization encountered when it was founded in 1945. To avoid marginalization, the UN has to find ways and means to address new challenges, including its identity crisis, diverse setbacks and failures, financial problems, rapid change in international

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6 See MONTY G. MARSHALL and TED ROBERT GURR. *Peace and Conflict 2005: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy*. College Park, MD: Center for International Development and Conflict Management, 2005. 2.

7 See MICHAEL E. BROWN. "Causes and Implications of Ethnic Conflict." In *Ethnic Conflict and International Security*, ed. Michael E. Brown, 3-26. Princeton, NJ: Princeton University Press, 1993. 5.

8 *World Refugee Survey 2005*. www.refugees.org/WRS2005.

relations due to globalization and growing international independence. UN responses to current security threats, such as international terrorist networks, organized crime, and internal warfare, have to be multilateral and cooperative.

For international lawyers, the challenge is now to rethink some of their most fundamental principles to meet the threat of ethnic conflict. International law has many functions, including guiding behavior of parties to the conflict and other actors involved, structuring coordinated responses, providing procedures for conflict resolution, and establishing the basis for an authoritative decision.[9] Many areas of international law, such as international human rights and humanitarian law, the law of treaties, the law of state succession, state responsibility, and state recognition, and the law of international organizations are relevant to the legal analysis of claims by groups. In this context, ethnic conflicts pose both challenges and opportunities. The challenge arises from the need to contain, and if possible, resolve such conflicts. The opportunities arise from the fact that ethnic conflicts may create space for significant social and political changes and thus provide opportunities to promote democracy, strengthen human rights, and build up capacity of states.[10]

Issues arising from ethnic conflict influence key aspects of the international order and, as a result, international law. These include the legitimate basis for statehood, sovereignty, and citizenship; the extent to which group claims should be recognized by the international community; the political, social, and cultural rights of ethnic groups and their members; the role international organizations can and should play in responding to ethnic conflict and in promoting and monitoring rights for ethnic groups; the compatibility of conflict resolution strategies and human rights; the circumstances in which force can be used to support claims by ethnic groups or to protect them against gross violations of their rights; and the responsibilities of the international community in dealing with consequences of ethnic

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[9] For a more detailed analysis, see BENEDICT KINGSBURY. "Claims by Non-State Groups in International Law." In *International Law and the Rise of Nations: The State System and the Challenge of Ethnic Groups*, ed. Robert J. Beck and Thomas Ambrosio, 156-179. New York , NY/London: Chatam House, 2002. 157/158.

[10] DAVID J. SCHEFFER. "U.N. Engagement in Ethnic Conflicts." In *International Law and Ethnic Conflict*, ed. David Wippman, 147-177. Ithaca, NY/London: Cornell University Press, 1998. 148.

conflicts such as refugee flows, humanitarian catastrophes, and the reconstruction of war torn societies.[11]

All of these aspects will be addressed in this study, with a particular focus on human rights in the context of the UN. The purpose of this analysis is to examine how international law can contribute to efforts of ethnic conflict resolution. It sketches preliminary answers to five core questions: (1) What are the points of contact between ethnic conflict and international law? (2) What international legal concepts, instruments, and institutions exist to address issues involving ethnic groups, minorities, and conflict? (3) How does international law deal with claims of ethnic groups? (4) Which international legal instruments, procedures, and institutions deal with claims of ethnic groups and the violation of minority rights and in what way do they contribute to ethnic conflict resolution? (5) How could these measures be improved?

This study reviews points of contact between ethnic conflict and international law and examines international strategies, institutions, and instruments dealing with ethnic conflict. It finds significant flaws in the application of international law – both in its norms and institutional design – to prevent, manage, and resolve ethnic conflict. It identifies key areas where international law may significantly improve the global response to ethnic conflict and, in the process, consolidate social progress and political stability. These key areas include the way in which the international community deals with claims of ethnic groups and international engagement in ethnic conflict resolution.

The study focuses on the rights, claims, and disputes of suppressed or numerically inferior ethnic groups, which in most cases constitute minorities in the countries where they live.[12] For the purpose of this study, the terms "minority" and "ethnic group" are used interchangeably unless indicated otherwise.

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[11] See more detailed DAVID WIPPMAN. "Introduction: Ethnic Claims and International Law." In *International Law and Ethnic Conflict*, ed. David Wippman, 1-21. Ithaca, NY/London: Cornell University Press, 1998. 2.

[12] One exception worth mentioning are the black and colored people in South Africa. Even though they constitute a numerical majority within the country, their rights have been rigorously constricted; they face economic discrimination, and – during the apartheid regime – were subject to severe human rights violations.

Current State of Research

A tremendous amount of literature is concerned with ethnic groups and ethnic conflict as well as the rights of minorities in international law. However, despite the fact that ethnic conflict touches upon core issues of international law, in most cases studies do not involve an interdisciplinary perspective and are focused on either political or legal analysis. Theoretical debates among political scientists, international relations experts, and international lawyers center around three major topics: first, the question of why international rules matter; second, how norms should be interpreted; and third, what strategies the international community should adopt when engaging in ethnic conflict resolution. All three debates are relevant to this study as they form the theoretical framework for the arguments in the following chapters.

International law and international relations theory have offered a variety of explanations about why international rules matter. At the most basic level, three different answers can be identified which indicate why :

1. Norms form part of a regime that affects the incentives, and as a consequence, the behavior of states when interacting with one another (instrumentalism);
2. Certain internal traits of norms cause states to obey them and so change their identity (normativism);
3. Certain domestic patterns will affect the state's propensity to comply with norms (liberalism).

First, the instrumentalist optic describes theories that "focus … on interests and … argue that rules and norms will matter only if they affect the calculations of interests by agents."[13] Two sub-categories can be distinguished: realism and institutionalism. Realists believe that international rules matter because it is in the interest of the state to comply with the rule. The norms as such do not play a role in this view.[14] Institutionalists share the realists' focus on state interests, but they believe that states can create institutions that issue rules. These institutions and rules affect state behavior because they form part of an entire

[13] See ROBERT O. KEOHANE. "International Relations and International Law: Two Optics." *Harvard International Law Journal* 38 (1997): 487-502. 487-489.

[14] See ANDRE NOLLKAEMPER. "On the Effectiveness of International Rules." *Acta Politica* 27 (1992): 49-70. 49, 52.

regime that alters incentives of states to comply or not to comply.[15] Incentives can be altered because the benefits of the regime depend on compliance, the possibility to link compliance with a particular norm to cooperation on other issues, and international pressure to comply with norms.[16]

Second, the normative optic states that "norms have causal impact… They exert a profound impact on how people think about state roles and obligations, and therefore state behavior."[17] The normative optic comprises two different schools of thought, both based on the assumption that norms *qua* norms directly influence state behavior.[18] First, and most prominently, the New Haven School of international law argues that an international norm produces a "compliance pull"[19] based on its legitimacy, which is measured by three factors: the norms' historical origin and the authority connected with it; its determinacy, namely the clarity of its content and the possibility to implement it; and its coherence, which means consistency with higher norms of the international system.[20] Second, constructivists argue that legal rules define identity, interests, and structures, and do not rely on already determined interests of states or the structure of the international system.[21] Some scholars have gone even further and try to understand the way in which norms shape the identity of states.[22]

Liberal scholars combine the two approaches and link state behavior to domestic structures and state-society relations in general.[23] They shift the focus from instrumentalists' attention to the international system and the normativists' attention to the characteristic of a particular norm to the traits of a particular state that makes the state more or less willing to accept international obligations.[24]

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15 KEOHANE, International Relations and International Law, 490.
16 NOLLKAEMPER, Effectiveness of International Rules, 55-56.
17 KEOHANE, International Relations and International Law, 492.
18 An overview of the two opinions is given by RATNER, Does International Law Matter, 649-651.
19 The term was developed by THOMAS M. FRANCK in his book "The Power of Legitimacy Among Nations". See THOMAS M. FRANCK. *The Power of Legitimacy Among Nations*. Oxford: Oxford University Press, 1990.
20 See FRANCK, Power of Legitimacy, 50-194.
21 See JOHN G. RUGGIE. "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge." *International Organization* 52/4 (1998): 855-885. 878-882.
22 See for instance MARTHA FINNEMORE and KATHRYN SIKKINK. "International Norm Dynamics and Political Change." *International Organization* 52/4 (1998): 887-917.
23 See for example ANDREW MORAVSCIK. "Taking Preferences Seriously: A Liberal Theory of International Politics." *International Organization* 51/4 (1997): 513-553.
24 RATNER excludes realism because realism essentially holds that norms do not affect state behavior. See RATNER, Does International Law Matter, 651-658.

When starting from the premise that international rules matter, two basic possibilities of interpreting norms exist in law. One contends that law is more than politics and surrenders even the most difficult legal questions to courts and judges (positivism); the other contends that law is politics through and through and courts are essentially influenced by this connection (legal realism, not to be confused with the political realist approach).

Positivists insist that law and politics are distinct spheres of thought and action, calling for different skills and depending on different sources of legitimacy. Consequently, positivists see the function of law as judging, namely applying authoritative prescription to particular cases. In the view of positivists, international legal obligations are based on a sovereign state's consent to be bound by a normative declaration. Natural law claims, whether based on religious convictions (law of a divine authority) or secular notions of necessity (law through right reason), are rejected. Insistence on sovereign consent as the source of international law has both logical and practical implications: it is logical because, under the shared understanding of the sovereignty and equality of states, no higher authority should exist; and it is practical because, in the absence of a centralized institution providing and enforcing legal prescriptions, compliance with international obligations remains voluntary.[25] In other words, all that is not clearly forbidden is allowed. Law is a matter of fact, and not a matter of degree – an act is either legal or illegal. However, especially in international law, there is a large "gray area" between law, history, and politics, and between the scope of international legal norms and domestic enforcement. There is never a "bright line" between law and politics, and a lot depends on interpretation, context, and interests of the actors involved.

For legal realists, norms are a construct of widely shared opinions that are enforced by the state. Law is made by human beings and thus imperfect, a matter of degree, a trend, depending on both how strong the shared beliefs are and the ability of the authority to enforce it.[26] Therefore, positivist and realist international lawyers have different agendas: the positivist is concerned primarily with texts of treaties, legally non-binding instruments such

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[25] TOM FARER. "Conclusion: What Do International Lawyers Do When They Talk about Ethnic Violence and Why Does It Matter?" In *International Law and Ethnic Conflict*, ed. David Wippman, 326-346. Ithaca, NY/London: Cornell University Press, 1998. 326-328.

[26] Legal realists include for example Justice OLIVER WENDELL HOLMES. See also the works of DUNCAN KENNEDY. *Critique of Adjudication [fin de siecle]*. Cambridge, MA: Harvard University Press, 1997; and RICHARD A. POSNER. *The Problems of Jurisprudence*. Cambridge, MA: Harvard University Press, 1990.

as declarations and resolutions, and jurisprudence of domestic and international bodies, whereas the realist focuses on the evaluation of state behavior. However, despite their differences legal positivists and realists are part of the same intellectual family. Both see the international system as a system shaped by common interests and cooperation, which coexists with conflicts. Both see law as a means to codify relationships and obligations of co-existing states, expressing the state's long-term common interests.[27]

To address ethnic conflict through law, one has to find a balance between the approaches described in the preceding paragraphs. A legal approach has to decide if an action is lawful or unlawful or at least give some predictability if an action will be perceived unlawful or lawful. This estimate of lawfulness relies on the interpretation of international legal norms such as treaties, statutes, or legally non-binding instruments, as well as customary international law and state practice. But neither text nor practice are decisive, because law cannot be separated from its political and historical context. Permissible behavior is dependent on the new questions, new facts, and different contexts that each new case implicates. Furthermore, international law – regarding both development and compliance – is always shaped by power relations. Any intervention strategy that is directed at a single cause or at only one set of social and political pressures is doomed to fail.[28]

From a traditional international legal point of view, the international community is not allowed to intervene in domestic matters of states, and thus should not get involved in ethnic conflict at all. Article 2, paragraph 7 of the Charter of the United Nations (thereafter "UN Charter") states that "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." However, in the last decades, a shift from the absolute interpretation to a more context-specific, relative interpretation of this provision can be observed. The Security Council of the United Nations (UNSC) stated on several occasions that ethnic conflicts, the

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[27] See more detailed FARER, Conclusion, 327-330.

[28] FEN OSLER HAMPSON. "Parent, Midwife, or Accidental Executioner: The Role of Third Parties in Ending Violent Conflict." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, 387-406. Washington, D.C.: United States Institute of Peace Press, 2001. 399.

repressions of minorities, and systematic gross human rights violations pose a threat to international peace and security and should thus be addressed by the UN.[29]

However, different views exist on how the international community should get involved in the resolution of violent ethnic conflict. The debate among international relations scholars can be divided into a "realist" view, a "liberal" view, and a more socio-psychological approach to intervention into ethnic conflict. Even among these paradigms, different schools of thought exist. Traditional realists argue for a narrow range of intervention strategies, most of them including the use of force.[30] They argue that intercommunal conflict is to a certain extent similar to international conflict, as ethnic groups experience the same kind of security dilemmas as states. In the view of realists, the use of force, the balance of power, and territorial solutions play key roles in the resolution of ethnic disputes. Some scholars argue that an ethnic conflict should be ended by partition or military victories.[31] Ethnic conflict in a realist view can be understood as a rational political process originating in strategic behavior by ethnic leaders in which the costs for civil war are lower than those of any other political option. The balance of power in a country has to be maintained to prevent domestic political orders from breaking down. This can be done by sanctions and interventions under the lead of great powers. However, the incentives for great powers are limited because ethnic conflict elsewhere does not usually threaten a state's national interests. Representatives of neorealism, a "softer version" of realism, believe that besides the use of force, soft power like mediation and negotiation as well as international actors play a role in

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[29] Most prominently, the UNSC stated this in its Resolution 688 (1991) in the aftermath of the Gulf War, UN Doc. S/RES/688 of 5 April 1991, and in its Resolution 751 (1992) concerning Somalia, UN Doc. S/RES/751 of 24 April 1992.

[30] See KENNETH WALTZ. *Theory of International Politics*. New York, NY: McGraw-Hill, 1979. Regarding ethnic conflict in particular see BARRY R. POSEN. "Nationalism, the Mass Army, and Military Power." *International Security* 18/2 (1993): 80-124; STEPHEN VAN EVERA. "Hypotheses on Nationalism and War." *International Security* 18/4 (1994): 5-39; CHAIM KAUFMANN. "Possible and Impossible Solutions to Ethnic Wars." *International Security* 20/4 (1996): 136-175. Representatives of a "softer realism" or neo-realism are DAVID A. LAKE and DONALD ROTHCHILD. "Spreading Fear: The Genesis of Transnational Ethnic Conflict." In *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation*, ed. David A. Lake and Donald Rothchild, 3-32. Princeton, NJ: Princeton University Press, 1998; JACOB BERCOVITCH. *Resolving International Conflicts: The Theory and Practice of Mediation*. Boulder, CO: Lynne Rienner, 1996; and the views presented in the edited volume *Elusive Peace: Negotiating an end to Civil Wars,* ed. I. William Zartman. Washington, D.C.: Brookings Institution, 1995.

[31] See for example ALEXANDER B. DOWNES. "The Problem With Negotiated Settlements to Ethnic Civil Wars." *Security Studies* 13/4 (Summer 2004): 230-279.

the management of ethnic conflict. Non-territorial, political solutions such as power-sharing arrangements or autonomy are seen as good possibilities to settle ethnic tensions.

Realism is highly state-centric and offers little advice regarding the societal and psychological effects of ethnic conflict. Ethnic identities, the polarization of societies, violence against civilians, and the level of atrocities committed in ethnic conflicts can hardly be explained using only realist approaches.

Liberal scholars see ethnic conflicts less as a consequence of security dilemmas and more in terms of a set of key variables that are based on the governmental, societal, or individual level. These include the violation of basic human and minority rights, the rejection of the rule of law, and repressive and authoritarian regimes.[32] Liberal conflict management is rooted in the Kantian model of republicanism that stresses the rule of law and liberal rights as the core of the political order. Third party involvement should thus focus on the creation on participatory governance structures, the development of new social norms, the establishment of democracy, and the protection and promotion of human rights.

Like neorealists, governance-based liberal approaches stress the importance of political institutions. But where soft realists focus on power-sharing at the state level, liberals emphasize the importance of democratic political institutions that facilitate participation at the societal level. This involves the establishment of a complex system that addresses the characteristics of the legal and judiciary system, public service, the private sector, and interactions among them. Good governance depends in their view on the active promotion of human rights. International actors such as the UN, regional organizations, and Non-governmental Organizations (NGOs) provided with relevant knowledge and resources are the key actors that have the ability and capacity to perform a great role in peace building, democratic governance, and establishment of the rule of law.

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[32] See in general MICHAEL W. DOYLE. *Ways of War and Peace: Realism, Liberalism, and Socialism.* New York, NY: Norton, 1997. Regarding ethnic conflict, see *Democracy and Deep-Rooted Conflict: Options for Negotiators.* Stockholm: International IDEA, 1997; WILL KYMLIKA. *Multicultural Citizenship.* Oxford: Clarendon, 1995; PAULINE H. BAKER. "Conflict Resolution v. Democratic Governance: Divergent Paths to Peace?" *In Managing Global Chaos*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, 753-764. Washington, D.C.: United States Institute of Peace Press, 1996; DAVID LITTLE. *Sri Lanka: The Intervention of Enmity.* Washington, D.C.: United States Institute of Peace Press, 1994; and *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz. Washington, D.C.: United States Institute of Peace Press, 1995.

From a realist or neorealist point of view, liberal approaches raise questions regarding state sovereignty and the involvement of outsiders in domestic affairs of a state. Furthermore, governance-approaches do not appropriately address the difficulties that accompany transitions after violent conflict including the treatment of conflict-related traumas, confidence building, and reconciliation.

The work of sociologists and psychologists in the field of conflict management deals with these issues.[33] In contrast to the state-centered approaches of realism and the governance-centered approach by liberals, these methods focus on societal relations and the development of dispute resolution systems at the local and individual level. Third parties should play a neutral and facilitating role, guiding rather than directing parties to mutually acceptable solutions. International actors, especially individuals or NGOs, play a role as they have the independence and expertise to deal with this kind of facilitation. However, societal-based approaches can be problematic in that conflicting parties may not take them seriously. Often facilitators do not work with the official representatives of the groups, but with middle-range elites such as academics, advisers, and retired politicians. This implicates the problem of how to disseminate the results of so-called problem solving workshops to elites and decision makers. Unless there is some form of interaction and the individuals participating in the workshops are selected carefully, there will be limited or no impact on the decision making and behavior of the society as a whole. Furthermore, individuals who take part in the workshop may not behave accordingly and return to old patterns once back in their normal jobs because of the pressures of their immediate social environment. However, as it is difficult to measure the outcomes of problem solving workshops, it is also difficult to predict their influence on societal change.

This study starts from the premise that international rules matter in shaping the behavior of states and the strategies adopted by the international community. The approach

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[33] See, for example, HERBERT C. KELMAN. "Informal Mediation by the Scholar/Practitioner." In *Mediation in International Relations: Multiple Approaches to Conflict Management*, ed. Jacob Bercovitch and Jeffrey Z. Rubin, 64-96. New York, NY: St. Martin's Press, 1992; JOHN W. BURTON. *Conflict and Communication: The Use of Controlled Communication in International Relations*. London: Macmillan, 1969; anRONALD J. FISHER. "Prenegotiation Problem-Solving Discussions: Enhancing the Potential for Successful Negotiations." In *Getting to the Table: The Process of International Prenegotiation*, ed. Janice Gross Stein, 206-238. Baltimore, MD: Johns Hopkins University Press, 1989.

pursued reflects the opinion that international relations and politics shape international law substantially and international norms and instruments cannot be viewed separately from political, economic, and social developments. The approach chosen in this study is thus comprehensive and interdisciplinary in nature, including approaches from various disciplines and schools of thought. Instead of taking one of the discussed approaches, the view taken is based on a human rights approach to ethnic conflict, thus combining both legal and political aspects. The ability of international law to address ethnic disputes goes to the heart of current debates about the pertinence of international law and touches upon fundamental issues such as state sovereignty, state decision-making, and human rights. This goes beyond the legal discipline and needs to take into account other approaches originating in political and social sciences, history, and anthropology.

Outline of the Study

To address the issues at stake, the study is divided into five chapters. The first chapter is designed to provide the reader with a broad understanding of basic concepts, causes, and the nature of ethnic conflict. It addresses the question how ethnic groups should be defined in both political and social sciences as well as international law. It gives an overview of underlying and proximate causes of ethnic conflicts as well as its nature, character, and international context.

The second chapter reviews international legal approaches to ethnic conflict and minority protection against the context of international human rights law. The tension between the notion of equality of all human beings and the concept of the protection and promotion of rights for certain groups as well as basic legal norms and institutions are addressed in this chapter. A special emphasis is placed on the right of peoples to self-determination and minority rights under international law.

The third chapter looks at how international law deals with claims of ethnic groups. Claims to protection and empowerment are viewed through an international legal lens. Human rights norms, jurisprudence, and documents of UN human rights bodies build the basis for the argumentation in this chapter.

The fourth chapter is concerned with the UN's institutional reaction to ethnic conflict and ethnic claims. It reviews different methods, instruments, and possibilities used by the UN and its agencies to intervene in ethnic conflict at various stages. The chapter starts with general considerations about human rights and conflict resolution approaches and how these approaches can be combined.

The last chapter is based on the conclusions of the preceding chapters and gives recommendations on how international law and UN involvement in ethnic conflict resolution could be improved. The chapter is divided into legal and political measures as both are important to address ethnic conflicts comprehensively.

1. Ethnic Conflict: Definitions and Concepts

During the 1990s, the international order observed a decrease in inter-state conflict, but an increase in intrastate conflict, especially ethnic conflict. The dissolution of the Soviet Union, artificial borders in formerly colonized parts of the world, and the concept of the nation-state contributed to the emergence of ethnic conflicts throughout the world. In the last few years, a "zone of conflict" can be identified, involving sub-Saharan Africa, parts of Central and Latin America, South Asia, and the Middle East in deadly wars.

However, ethnic conflict is not a new phenomenon. Disputes between ethnic communities date back to ancient times and have shaped world history. Between 1946 and 2000, approximately 50 ethnic conflicts took place. Of these, 60 percent started – and in some cases ended – before 1990, and 40 percent erupted in the decade following the end of the Cold War.[34] These conflicts have a variety of causes, take different forms, and affect the society and the regional and international environment in many ways.

The following chapter will address concepts, definitions, and the international context of ethnic conflict. Starting with an overview of different approaches to define ethnic groups and minorities, this chapter is designed to introduce the concept of ethnicity, identity, and challenges posed by definitional issues. The second part focuses on the phenomenon of ethnic conflict itself, discussing the causes, character, and international consequences of ethnic conflict.

1.1 What is an Ethnic Group?

To address the issue of ethnic conflict, it is crucial to clarify the notion of "ethnic groups". As we will see in the following chapters, several definitions of ethnic groups and minorities exist. Most of them are interrelated and share basic ideas, especially the reliance

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[34] With more than 25 people killed per year. See ERIKSSON, WALLENSTEEN, and SOLLENBERG. Armed Conflict, 1989-2003, 625-636.

on objective factors, such as a shared language, skin, color, or religion, and subjective factors, namely the self-identification of an individual with an ethnic group and, in turn, the acceptance of the individual by the group. The definition of the term "ethnic group" is dependent on the context and the academic approach chosen. The following chapter is divided into two parts: political and social science approaches to defining ethnic groups (summarized by the term "ethnic conflict research") and international legal approaches to defining minorities.

1.1.1 Definition of Ethnic Groups in Ethnic Conflict Research

In ethnic conflict research, the terms "ethnic group", "communal group", "ethnic community", "peoples", and "minority" are mostly used interchangeably.[35] "Minority" is not only used to refer to a group numerically inferior compared to the whole population of a society, but also expresses the power structure in a given case, namely to describe a group in a disadvantaged position. Two elements provide the basis to identify ethnic groups: first, the accentuation of cultural traits or the belief in a common ancestry, and second, the sense that these traits distinguish the group from the other members of the society that do not share the differentiate characteristic.[36] These "ethnic criteria", or rather origins of communal identity, may include shared historical experiences or myths, common descent, religious beliefs, language, ethnicity, and region of residence. According to ANTHONY D. SMITH, an ethnic community has six characteristics: a common name, a myth of common ancestry, shared memories (including historical experiences, myths, and legends), a link with a historic territory or a homeland (which the group may or may not currently inhabit), a common culture, and a measure of common solidarity and self-awareness.[37] Elements of common

[35] See TED ROBERT GURR. *Minorities at Risk: A Global View of Ethnopolitical Conflicts*. Washington D. C.: United States Institute of Peace Press, 1993. 3.

[36] See ANTHONY D. SMITH. "The Ethnic Sources of Nationalism." In *Ethnic Conflict and International Security*, ed. Michael E. Brown, 27-41. Princeton, NJ: Princeton University Press, 1993. 28f.

[37] See ANTHONY D. SMITH. *The Ethnic Origins of Nations*. Oxford: Blackwell Publishers, 1986. 22-30.

culture include language, religion, laws, customs, institutions, dress, music, crafts, architecture, and even food.[38]

Tangible characteristics such as shared culture, language, or religion are important because they contribute to the group's feeling of identity, solidarity, and uniqueness. As a result, the group considers threats to its tangible characteristics, even if it is not a real but only a perceived threat, as risks to its identity. If the group takes steps to confront the threat, ethnicity becomes politicized and the group becomes a political actor by virtue of its shared identity.[39]

On the other side, ethnicity is just as much based on what people believe, or are made to believe, to create a sense of solidarity among those who are members of a particular ethnic group and to exclude those who are not.[40] There is no indication that one of the tangible traits is more likely to cause conflict than other features. Nor is there a connection between the strength of identity and the level of violence in an ethnic conflict.[41] There is no automatism that leads from the existence of ethnic differences to conflict between groups.

The terms "ethnic" and "ethnicity" have their roots in the Greek word "ethnos" which describes a community of common decent.[42] Most scholars agree upon the origin of the word and its original meaning. However, because of its politicized nature, the exact meaning of ethnicity is greatly disputed both among academics and politicians. There are namely four broad approaches to the study of ethnicity and ethnic conflict: the primordialist, the instrumentalist, the constructivist, and the psychocultural approach.

First, primordialists explain ethnicity as a fixed characteristic of individuals and communities.[43] Ethnic divisions are natural as ethnicity is rooted in inherited biological traits

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38 According to MICHAEL E. BROWN. "Ethnic and Internal Conflicts: Causes and Implications." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, 209-226. Washington, D.C.: United States Institute of Peace Press, 2001. 210.

39 WALKER CONNOR. *Ethnonationalism: The Quest for Understanding*. Princeton, NJ: Princeton University Press, 1994. 104.

40 ANTONY D. SMITH. *National Identity*. London: Penguin, 1991. 21.

41 As is described in the study of JAMES D. FEARON and DAVID D. LAITIN. "Ethnicity, Insurgency, and Civil War." *American Political Science Review* 97/1 (February 2003): 75-90. 75.

42 CONNOR, Ethnonationalism, 100.

43 Primordialists include for example CLIFFORD GEERTZ. "The Integrative Revolution: Primordial Sentiments and Civil Politics in New States." In *The Interpretation of Cultures*, ed. Clifford Geertz, 255-311. New York, NY: Basic Books, 1973; STEPHEN VAN EVERA. "Primordialism Lives!" *APSA Comparative Politics Section Newsletter* 12/1 (Winter 2001): 20-22; and JOHN M.G. VAN DER DENNEN. "Ethnocentrism and In-

and/or long history of practicing the differences. Primordialists see ethnic identity as being unique in its intensity and durability and stress the importance of ethnicity for individuals and communities. Violent ethnic conflict follows directly from ethnicity and only needs some catalysts to break out. ANTHONY D. SMITH states:

> Wherever ethnic nationalism has taken hold of populations, there one may expect to find powerful assertions of self-determination that, if long opposed, will embroil whole regions in bitter and protracted ethnic conflict. Whether the peace and stability of such regions will be better served in the short term by measures of containment, federation, mediation, or even partition, in the long run there can be little escape from the many conflagrations that the unsatisfied yearnings of ethnic nationalism are likely to kindle.[44]

The primordialist assumption of fixed identities and its failure to recognize variation in ethnic conflict over time and places has led to major criticism and the development of other approaches. The second approach discussed here is the so-called instrumentalist approach, which understands ethnicity as a tool used by individuals, groups, and leaders to achieve larger goals.[45] In this view, ethnicity serves as a powerful means to unify, organize, and mobilize groups to achieve a given aim, which is mostly of political nature. As a consequence, ethnicity has little or no independent standing outside the political process and is in its character comparable to other political affiliations such as ideology or party membership. Ethnicity is seen as a result of each individual's choice and does not depend on either the society or cultural or biological traits. From an instrumentalist perspective, ethnic conflict is the result of elites who mobilize their followers on grounds of ethnicity in order to pursue their own interests. Ethnic conflict is similar to other conflicts in which elites pursue certain interests and, as a consequence, lessons learned can be applied to other civil and political strives as well. Critics of instrumentalism argue that ethnicity, in contrast to other political affiliations, cannot be decided upon by individuals at will, but is embedded within and controlled by the society as a whole.[46] They point to the social nature of all ethnic

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Group/Out-group Differentiation: A Review and Interpretation of the Literature." In *The Sociobiology of Ethnocentrism: Evolutionary Dimensions of Xenophobia*, ed. Vernon Reynolds, Vincent Fagler, and Ian Vine, 1-47. Athens, GA: University of Georgia Press, 1986; HAROLD ISAACS. *Idols of the Tribe: Group Identity and Political Change*. New York, NY: Harper and Row, 1975; as well as SMITH, Ethnic Origin of Nations and CONNOR, Ethnonationalism.

44 SMITH, Ethnic Origin of Nations, 40.

45 Instrumentalists include NATHAN GLAZER and DANIEL P. MOYNIHAN. *Ethnicity: Theory and Experience*. Cambridge MA: Harvard University Press, 1975; and the edited volume *Ethnic Groups and the State*, ed. Paul Brass. London: Croom-Helm, 1985.

46 See LAKE and ROTHCHILD, Spreading Fear, 6.

identities and argue that ethnicity can only be understood in a relational framework.[47] In their view, it is the interaction among ethnic groups and individuals that shapes their identity.

This leads to the third, so-called "constructivist" approach that emphasizes the social origin of ethnicity.[48] In the constructivist view, ethnicity is neither fixed nor completely open, but ethnic identity has been constructed by social interactions between individuals and groups. As such, ethnicity is a social phenomenon. Ethnic identity remains beyond a person's choice, but is subject to change if the social conditions change. Regarding ethnic conflict, constructivists agree with instrumentalists that the outbreak of violence needs to be explained, but disagree on the reasons. Conflict is in their view caused by certain types of social systems (e.g. discriminatory regimes) in which individuals cannot choose their own affiliations.[49]

A more psychological view ascribes ethnicity deep cultural and psychological roots, which makes it extremely persistent. Like primordialists, psychocultural interpretations[50] stress the importance of shared, deeply rooted worldviews that shape a group's relationship with others, their actions and motives. Understanding a group's psychocultural interpretations or worldviews means making sense of their origin, the intensity of their identity, and the significance of political action.[51] Ethnic conflict engages central elements of each group's identity and invokes fears and suspicion about the opponents. They are polarizing events that become important because of their connection with the group's identity and history. Ethnic conflict is thus not simply a political event, but a drama that challenges the very existence of the group and its identity. As a consequence, negotiations,

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47 MILTON J. ESMAN. *Ethnic Politics*. Ithaca, NY: Cornell University Press, 1994. 40.

48 For constructivist approaches see *inter alia* BENEDICT ANDERSON. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. London: Verso, 1991[2]; the essays by CHANDRA KANCHAN, DAVID LAITIN and DANIEL POSNER, AREND LIJPHART, STEVEN I. WILKINSON, and IAN LUSTICK. "Cumulative Findings in the Study of Ethnic Politics." *APSA Comparative Politics Section Newsletter* 12/1 (Winter 2001): 6-25; DAVID LAITIN. *Hegemony and Culture*. Chicago, IL: University of Chicago Press, 1986[2]; VIRGINIA R. DOMINGUEZ. *People as Subject, People as Object: Selfhood and Peoplehood in Contemporary Israel*. Madison, WI: University of Wisconsin Press, 1989; and ROGER BRUBAKER. "National Minorities, Nationalizing States, and External National Homelands in the New Europe." *Daedalus* 124 (Spring 1995): 107-132.

49 LAKE and ROTHCHILD, Spreading Fear, 6/7.

50 See for a general overview VAMIK VOLKAN. *Bloodlines: From Ethnic Pride to Ethnic Terrorism*. New York, NY: Farrar Straus Giroux, 1997.

51 See for a more detailed description MARC HOWARD ROSS. "Psychocultural Interperation Theory and Peacemaking in Ethnic Conflict." *Political Psychology* 16 (1995): 523-544.

the redefinition of goals, and compromise are difficult as ethnic identities cannot be changed, only made more tolerant and open-minded.[52]

In reality, some ethnic identities have deep historical roots while others do not, and some groups have static identities, while others have dynamic. The concrete form and design of ethnicity and its propensity to lead to violence and warfare depends on the context of each case. In the words of MILTON J. ESMAN:

> Ethnicity cannot be politicized unless an underlying core of memories, experience, or meaning moves people to collective action. […] Ethnic identities are also contextual, adaptable to and activated by unexpected threats and new opportunities; […] Thus every ethnic collectivity and solidarity can be located on a spectrum between (primordial) historical continuities and (instrumental) opportunistic adaptations.[53]

These identities can be hardened by several influences. Indisputably, the first factor is war and violence.[54] Stories of a common struggle, sacrifices for a common goal, and human suffering create a strong feeling of connection among the survivors of a war. A survey of ethnic identities in the former Yugoslavia showed that the proportion of Yugoslav residents identifying themselves as "Yugoslav" and not in ethnic terms increased from 1.7 percent in 1961 to 5.4 percent in 1981, but fell to 3.0 percent in 1991 when the Balkan wars broke out.[55] Even those who assess their ethnicity as being unimportant are pressed towards mobilization for two reasons: first, extremists on both sides are likely to impose sanctions on those who do not commit themselves to the "cause".[56] And second, identity labels are often imposed by the opposing group or given by other outsiders.[57] Individuals have no right to choose and are pegged in a pre-labeled box.

A second reason why identities become fixed is mass literacy. Mass literacy allows the identity to be stored in writing and to be spread out to a mass audience.[58] Additionally, identity can be further developed and become more uniform as the narratives stay the same

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52 See MARC HOWARD ROSS. "Psychocultural Interpretations and Dramas: Identity Dynamics in Ethnic Conflict." *Political Psychology* 22 (2001): 157-178. 168.

53 ESMAN, Ethnic Politics, 14.

54 See also DANIEL BYMAN. "Forever Enemies? The Manipulation of Ethnic Identities and Ethnic Wars." *Security Studies* 9/3 (Spring 2000): 149-190. 154; and KAUFMANN, Possible and Impossible Solutions, 137 and 140-146.

55 See *Yugoslavia Survey*, 14/1 (1973), 24/3 (1983), and 33/1 (1992).

56 Typical examples include the assassination of Yitzhak Rabin in 1995 and the killing of moderate Hutu by Hutu extremists in Rwanda in 1994.

57 KAUFMANN, Possible and Impossible Solutions, 143/144.

58 Arguing in this direction is BYMAN, Forever Enemies, 154.

over time. A more clearly distinguished identity with historical and cultural content inspires more loyalty because it provides more substance. Even if an ethnic identity lies dormant for some time, it can be revived if the content is laid down in writing.[59]

Third, the identities of non-immigrant groups are far more fixed than the identities of immigrant ethnic groups. Immigrant groups often assimilate, especially if they are small in number. Non-immigrant groups, such as indigenous peoples or people who immigrated the country centuries ago, assimilate less often, especially if they were not voluntary immigrants and/or are easy to distinguish from the rest of the society by tangible traits such as physical markers.[60]

A fourth reasons for consolidated identities is the extent of an ethnic group's collective disadvantage vis-à-vis other groups. Economic, political, and cultural discrimination contributes to the salience of group identity. Memories of discrimination become part of the groups' history over time and contribute to fix their identity and narratives.[61] The discrimination ethnic groups experience can have many forms: threats on personal security (e.g., attacks on asylum seekers in Europe), discrimination in employment, housing, access to educational systems, right to property, and/or political discrimination, including limited or no access to political institutions, under-representation in government, etc.

In sum, the key to identifying ethnic groups is not the presence of a trait or a combination of traits, but the presence of a shared perception that these traits set the group apart from others. Ethnic groups can be both self-defined and defined by others, with a combination being the most common form of definition. The self-perception and self-definition of an ethnic group is subject to change, depending on the context and specific situation.[62]

Ethnic conflict or mobilization of ethnic groups depends to a great extent on the opportunities provided for the group to reach their goals. Past experiences shape the way in which the group will use its present opportunities. STEFAN WOLFF writes: "The fact that ethnic identity had its roots in the past and present is thus a curse as well as a blessing.

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59 See VAN EVERA, Primordialism Lives, 20.
60 Examples are the African-Americans in the U.S. Ibid., 22.
61 See more detailed GURR, Minorities at Risk, 124-129.
62 CRAWFORD YOUNG. "The Temple of Ethnicity." *World Politics* 35/4 (July 1983): 652-662. 659.

People cannot escape the fact that ethnic differences exist, but what they make of these differences is in their hands, and those of their leaders."[63]

1.1.2 An International Legal Approach to Defining Ethnic Groups

International lawyers agree to some extent with the definitions provided by ethnic conflict research. It is generally accepted that the existence of a minority or a people is a factual matter to be determined by a mixture of objective criteria, self-identification, and acceptance by other groups. Objective criteria depend on evidence, such as parentage, family background, religious practice, skin color, or linguistic ability. Self-identification is a matter of individual choice – both to identify as a member of a minority as well as the wish not to be identified as such – in combination with some form of objective assessment.[64] The criterion of acceptance by others is the least satisfactory, since it may result in exclusion of members of minority on unreasonable or self-interested grounds despite objective criteria and identification by individual choice. All three criteria are consequently needed for the determination of who constitutes a member of a minority group.[65]

However, international lawyers distinguish between "minorities" and "peoples". The determination of who is a member of a minority or what constitutes a people in international law has important impacts on the question of what rights an individual belonging to a minority or a people is entitled to and what obligations apply to the state. Most significant, peoples have the right to self-determination while minorities do not. The question arises in which cases ethnic groups constitute peoples who are entitled to self-determination. The problem is that neither concept is clearly defined in international law. Consequently, many attempts have been made to define the terms "minority" and "people".

The first efforts by international legal scholars and courts to determine the meaning and scope of the terms "peoples" and minority" date back to the Permanent Court of

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63 STEFAN WOLFF. *Ethnic Conflict: A Global Perspective*. Oxford: Oxford University Press, 2006. 40.

64 The Explanatory Report to the Framework Convention, for example, is very clear on this point: the "choice of belonging" principle in Article 3 "does not imply a right for an individual to choose arbitrarily to belong to any national minority. The individual's subjective choice is inseparably linked to objective criteria relevant to the person's identity." COE H(1997)010, paragraph 35.

65 TOM HADDEN. "International and National Action for the Protection of Minorities: The Role of the Working Group on Minorities." UN Doc. E/CN.4/Sub.2/AC.5/2004/WP.3, paragraph 22.

International Justice (PCIJ) advisory opinion in the case concerning *Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration (Greco-Bulgarian Communities)*. The court stated that a "community" is "a group of persons living in a given country or locality having a race, religion, language and tradition in a sentiment of solidarity, with a view preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another."[66] Since then, there have been numerous attempts to define the term, thus confirming the significance of the matter. The debate among scholars and courts evolves around the scope of application of the definition.[67]

As mentioned above, no agreement on the definition of the term "peoples" exists. A UNESCO report of 1989[68] offers the following description of a people (the report excludes explicitly a definition):

1. A group of individual human beings who enjoy some or all of the following common features:
    (a) a common historical tradition;
    (b) racial or ethnic identity;
    (c) cultural homogeneity;
    (d) linguistic unity;
    (e) religious or ideological affinity;
    (f) territorial connection;
    (g) common economic life;
2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;
3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such grows, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;
4. the group must have institutions or other means of expressing its common characteristics and will for identity.

This "description" of a people reflects some aspects of definition of ethnic groups in ethnic conflict research. The problem with this definition is, however, that it is very similar to the definition of minorities under international law.

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[66] PCIJ Advisory Opinion, *Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration (Greco-Bulgarian Communitities)*, PCIJ Series B, No. 17, 1930, paragraph 33.

[67] See very detailed and with references GAETANO PENTASSUGLIA. *Minorities in International Law: An Introductory Study*. Strasbourg: Council of Europe, 2002. 55-75.

[68] *International Meeting of Experts on further study of the concept of the rights of peoples*. UNESCO SHS-89/CONF.602/7, paragraph 22.

The question of what constitutes a "people" entitled to self-determination has led to debates with divergent opinions. Traditionally, self-determination is assigned to the state itself and thus to the "whole people" living within the boundaries of a state.[69] This was confirmed during the decolonization, in which the international community granted independence to the peoples along the lines of the former colonial territories (principle of *uti possidetis juris*, see Chapter 3). However, when defining a people entitled to self-determination as all people living within the boundaries of the state, only the majority profits from the right to self-determination except if measures of minority participation are in place. Concerns for cultural diversity and the advantages for democracy and stability if such diversity is respected, have resulted in challenging the *de facto* majoritarian actualization of the "whole people" condition.[70] The Badinter Commission, a group of European jurists set up in the early 1990s by the European Union (EU) to arbitrate disputes and establish criteria for recognition for the new states in the Balkans, did not consider the concept of "people" to be homogenous and linked the right of minorities to identity to a broader process of self-determination involving the whole population concerned.[71] The right to self-determination of ethnic minorities is thus linked to the notion that minorities are part of the "whole people".

Another concept regarding "whole people" identifies the "whole people" as "all distinct peoples", that is "whole people" in the sense of all individual, distinct "peoples" that form the "whole". A U.S. draft of the UN Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with Charter of the United Nations (thereafter "UN Friendly Relations Declaration"), adopted by the General Assembly as Resolution 2625 (XXV) in 1970, makes a reference to "all distinct peoples" in the territory of an independent state.[72] The question was addressed prominently by the Canadian Supreme Court in its Opinion in *Reference re Secession of Quebec* of 20 August,

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[69] See PENTASSUGLIA, Minorities in International Law, 163-167.

[70] GAETANO PENTASSUGLIA. "State Sovereignty, Minorities and Self-Determination: A Comprehensive Legal Review." *International Journal on Minority and Group Rights* 9 (2002): 303-324. 313.

[71] Arbitration Commission of Conference on Yugoslavia ("Badinter Commission"), Opinion of 11 January 1992 (Opinion no. 2), *International Legal Materials* (1992): 1497-1499.

[72] Cited in PENTASSUGLIA, State Sovereignty, 314.

1998.[73] In relation to the case dealing with the secession of Quebec, a number of questions were put to the Supreme Court, including whether the right to self-determination under international law would give the province of Quebec the right to unilateral secession from Canada.[74] The Court states in paragraph 124: "It is clear that 'a people' may include only a portion of the population of an existing state." But does a group within a state have the right to self-determination? The Canadian Supreme Court states further:

> While much of the Quebec population certainly shares many of the characteristics … that would be considered in determining whether a specific group is a "people", as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 [right to secede unilaterally] appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law, such a people encompasses the entirety of the provincial population or just a portion thereof. … As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.[75]

The Canadian Supreme Court thus declined to argue that the francophone community of Quebec was a "people" in the sense of international law, namely a people entitled to independence.

Apart from concerns for the preservation of state sovereignty, territorial integrity, and political unity, the approach to define the right-holder as one entity instead of its elements is reflected by other international instruments. The Human Rights Committee stated in *Apriana Mahuika et al. v. New Zealand* that the right to self-determination under Article 1 of the ICCPR is a collective right and thus "attach[es] to 'peoples' of a state in their entirety, not to minorities, whether indigenous or not, within the borders of an independent and democratic state."[76] In other words, "self-determination refers to 'demos' not to 'ethnos'."[77] As a result, minorities and ethnic groups are not *per se* holders of the right. However, they should benefit from the right to self-determination because they are part of the whole population.

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[73] 2 Supreme Court Reports (1998), paragraphs 123-125.

[74] See below.

[75] 2 Supreme Court Reports (1998), paragraph 125.

[76] *Apirana Mahuika et al. v. New Zealand*, HRC Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (2000), paragraph 7.6.

[77] ASBJØRN EIDE. "Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities." UN Doc. E/CN.4/Sub.2/1993/34, paragraph 76.

Therefore, the focus of the right to self-determination is not on the right-holder as a monolithic entity, but on the most appropriate means to implement the right (see Chapter 3). The basis for implementation is the right to "free choice" for all individuals and groups that together constitute the "whole people".[78]

Special cases constitute indigenous peoples who are a *sui generis* category of ethnic groups. There is an emerging recognition of the right of indigenous peoples to self-determination. This is not unchallenged: Convention No. 169 of the International Labour Organization (ILO) on Indigenous and Tribal Peoples states in Article 1, paragraph 3 that "[t]he use of the term "peoples" […] shall not be construed as having any implications as regards the rights which may attach to the term under international law." The convention does not provide indigenous peoples with the right to self-determination. It does however, specify some rights for indigenous groups that are strongly connected with self-determination.[79] The UN Draft Declaration on the Rights of Indigenous Peoples explicitly uses the term "self-determination" (Article 3), but links it with the establishment of autonomy as a special way to accommodate the right within the state (Article 31). Furthermore, indigenous peoples have the right to fully participate in the political, economic, social, and cultural life of the state (Article 4), especially in matters that concern their affairs (Articles 19 and 20).

The traditional definition of the term "minority" embraces different approaches by international legal scholars and practitioners to define a minority. The most common patterns are:

- numerical inferiority versus the dominant group in the state;
- non-dominant position;
- permanence of the minority (in some cases, the members of minorities must possess citizenship);
- different ethnic, religious, or linguistic characteristics (later, definitions add "nationality" as a further criterion);

[78] See more detailed PENTASSUGLIA, State Sovereignty, 304-324.

[79] See especially Article 6 and 7 of the ILO Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries (1989).

- and a sense of solidarity that is directed towards preserving their different culture, tradition, religion, or language.[80]

Objective elements such as numerical size, non-dominant position, ethno-cultural differences, and citizenship are combined with subjective elements such as the sense of solidarity and self-identification with the group. Most important, traditional definitions emphasize the firm ties of the group to the state in which they live. Thus, some categories of minorities are not covered by the definition and consequently not entitled to minority rights – especially immigrants, migrant workers, and refugees. This led to a call for a broader and more inclusive approach to defining minorities by progressive international lawyers.

The more comprehensive option of defining a minority only stresses the distinctive ethno-cultural features of the group, which serves as the underlying assumption for the whole system of minority protection.[81] The Human Rights Committee (HRC) confirmed this view in its General Comment No. 23 on Article 27 of the International Covenant on Civil and Political Rights (ICCPR): "Just as they [persons belonging to minorities] need not be nationals or citizens, they need not be permanent residents. Thus, migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights."[82] As a result of transboundary movements of populations, mainly due to socio-economic (migrant workers) or political reasons (refugees), the more comprehensive approach became more popular. The question if "new" minorities, such as the Turks in Germany, could gain minority status and the eruption of ethnic conflicts over the last 15 years made the minority problem more prominent on the international agenda. The demand to protect the cultural identity of members of minorities of all kinds became a primary concern.

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[80] See for example FRANCESCO CAPOTORTI. "Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities." UN Doc. E/CN.4/Sub.2/384/Rev.1, paragraph 568.

[81] This was a step by step process. Special Rapporteur ASBJØRN EIDE in 1993 defined a minority the following way: "a minority is any group of persons resident his within a sovereign State which constitutes less than half the population of the national society and whose members share common characteristics of an ethnic, religious or linguistic nature that distinguishes them from the rest of the group." EIDE, Possible ways and means, paragraph 29.

[82] HRC General Comment No. 23: Rights of Minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5 (1994), paragraph 5.2.

However, traditionalists and legalists countered the argument that including migrants, refugees, and immigrants makes the definition too broad and difficult to apply in practice.[83] Furthermore, parallel to the attempts of including the controversial categories of minorities (foreigners, migrant workers, and refugees), there have been efforts to protect these categories by special treaties, resolutions, and declarations.[84] These documents provide minimum guarantees against discrimination. However, the socio-economic and/or political aspects are the main concern in these documents rather than the protection of cultural identity, which is the main goal of minority protection.

In conclusion, the traditional definition still reflects the prevalent understanding of what constitutes a minority in international law. With regard to other groups, it is important that they at least benefit from anti-discrimination clauses. Fortunately, generous identification of the beneficiaries of minority protection cannot be branded contrary to international law. There is no international legal rule that prohibits a state from extending the rights enjoyed by its minority members to other groups as well.

Despite the lack of an internationally recognized definition, some common criteria for defining ethnic groups under international law can be identified. First, the existence of a group is not dependent on the recognition of a state, but only on objective and subjective criteria. The PCIJ stated in its advisory opinion on the *Greco-Bulgarian Communities* case that the existence of a community was a question of fact, not a question of law.[85] This was recently confirmed by the HRC in its general comment.[86] Thus, from an international legal point of view, the question of a state recognizing a minority in its domestic law is not decisive for the existence of a minority.

Second, members of the majority who live on minority territory do not constitute minorities under international law, even if they are a minority in the specific region. In the

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[83] See for example JOHN PACKER. "Problems in Defining Minorities." In *Minority and Group Rights in the New Millenium*, ed. Deirdre Fottrell and Bill Bowring. The Hague: Martinus Nijhoff, 1999. 223-273.

[84] See for example International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) or the Convention relating to the Status of Refugees (1951).

[85] PCIJ Advisory Opinion, *Greco-Bulgarian Communitities*, paragraph 22.

[86] HRC General Comment No. 23, paragraph 5.2.

Ballantyne et al. v. Canada[87] case before the HRC, the complainant, an English-speaking storeowner, claimed a violation of his right to use his own language under *inter alia* Article 27 of the ICCPR in relation to a Quebec law that only allows commercial advertising in French. He wanted to advertise in English, but was prohibited by law from doing so. The HRC stated that the case raised no minority issue, since English language speakers are not a minority in Canada as a whole and thus not protected by minority rights provided by Article 27.[88]

As of today, there is no legal definition of the term "minority". International institutions working with minority issues often follow a pragmatic approach: they recognize a minority without a formal definition.[89] In the words of former High Commissioner for National Minorities (HCNM) of the Organization for Security and Co-operation in Europe (OSCE), MAX VAN DER STOEL:

> The existence of a minority is a question of fact and not of definition. I know a minority when I see one. First of all, a minority is a group with linguistic, ethnic or cultural characteristics, which distinguish it from the majority. Secondly, a minority is a group which usually not only seeks to maintain its identity but also tries to give stronger expression to that identity.[90]

However, the lack of definition results in unforeseeability and unreliability, and consequently, in poor law. Good law requires clarification of the subjects of entitlements, along with the determination of the content of their rights. Furthermore, the international community forfeits its control over the matter to state governments who interpret self-determination and minority claims for their constituent groups, thereby allowing for different standards and the possibility of abuse. The real challenge regarding the definition of minorities under international law is not the development of a precise definition but the determination of important distinctions for the purposes of positive protective measures

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87 *Ballantyne, Davidson, McIntyre v. Canada*, HRC Communications Nos. 359/1989 and 385/1989, UN Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993).

88 Ibid., paragraph 11.2: "As to article 27, the Committee observes that this provision refers to minorities in States; this refers, as do all references to the "State" or to "States" in the provisions of the Covenant, to ratifying States. … Accordingly, the minorities referred to in article 27 are minorities within such a State, and not minorities within any province. A group may constitute a majority in a province but still be a minority in a State and thus be entitled to the benefits of article 27. English speaking citizens of Canada cannot be considered a linguistic minority. The authors therefore have no claim under article 27 of the Covenant."

89 HADDEN, International and National Action, paragraph 19.

90 MAX VAN DER STOEL. Speech at the opening of the OSCE Minorities Seminar in Warshaw, 24 May 1994.

such as the size, permanence, and distribution of minorities in form of general principles or guidelines. These guidelines should be capable of effective treatment of real problems.[91]

1.2 What is Ethnic Conflict?

Conflict is intrinsic to group relations and so is cooperation.[92] "Conflict" describes a situation in which two or more actors pursue incompatible goals. It is not necessarily violent, but the use of "tension", "dispute", or "unease" is more common in this context. Political disputes can become violent internal conflicts such as power struggles of military or civilian leaders, criminal rebellions, ideological struggles, and ethnic conflicts. A violent conflict is called a "civil war" or "armed conflict" if one thousand people or more have been killed;[93] the conflict had a certain duration; the protagonists have group identities and are organized; and military operations are used to achieve political goals. Spontaneous riots are not classified as armed conflict because they are neither organized nor durable.[94]

Ethnic conflict is a form of conflict in which the goals of at least one party are defined in ethnic terms, and the conflict, its causes, and potential remedies are perceived along ethnic lines.[95] It can involve political, economic, social, cultural, or territorial issues.[96]

As such, ethnic disputes are common in every plural or multiethnic society. Less than 20 percent of all the states in the world today are ethnically homogenous (meaning that ethnic minorities constitute less than 5 percent of their population).[97] And at least 17.4 percent of the world's population identifies with politically active ethnic groups.[98] Peaceful coexistence between different ethnic groups in one state is the rule rather than the exception. Problems between groups and the resulting tension arise in special circumstances such as periods of substantial change (e.g. the collapse of the Soviet Union), uncertainty, the

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91 PACKER, Problems Defining Minorities, 232.
92 EIDE, Possible ways and means, paragraph 52.
93 See the definition by J. DAVID SINGER and MELVIN SMALL. *Correlates of War Project: International and Civil Wars Data, 1816-1992*. Ann Arbor, MI: Inter-university Consortium for Political and Social Research, 1994.
94 See BROWN, Ethnic and Internal Conflicts, 212-214.
95 See WOLFF, Ethnic Conflict, 2-4.
96 BROWN, Ethnic and Internal Conflicts, 211.
97 See DAVID WELSH. "Domestic Politics and Ethnic Conflict." In *Ethnic Conflict and International Security*, ed. Michael E. Brown, 43-60. Princeton: Princeton University Press, 1993. 45.
98 *Survey of the Minorities of Risk Project.* www.cidcm.umd.edu/inscr/mar/about/definition.

emergence of opportunities for action, and a number of other reasons that will be discussed in this chapter. These situations create grievances that can lead to mobilization ranging from political action to violence and civil war.[99] Non-violent manifestations of conflict are sometimes necessary to achieve new consents and to remove barriers for future cooperation. The real issue is therefore not the existence of some degree of conflict, but the way in which it is handled – namely through the adoption of non-violent or violent means.

Ethnicity is often associated with nationalism. A "nation" is usually a politicized or "self-aware" ethnic group; nationalism is the movement of this group to achieve its political goals.[100] The use of the word "nation" is problematic. On the one side, "nation" can mean the state as such, e.g. as it is used in the term "international law" or in international legal documents.[101] If it refers to people, "nation" can be understood as the aggregate, permanent population of the state linked to the notion of citizenship in its legal sense. On the other side, "nation" is also widely used in the meaning of a politicized ethnic group and based on ethnicity rather than citizenship.[102] If nationalism is ethnic in character, the movement is primarily based on ethnic identity and excludes everyone with a different ethnicity. Political goals of ethnic nationalism often include the desire to self-government along the lines of their own culture, ranging from participation in public affairs to local segmental autonomy to territorial claims, including independence.[103] Civic nationalism, by contrast, is nationalism based on the whole territory of the state and citizenship (e.g., France).[104]

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[99] ROBIN M. WILLIAMS. "The Sociology of Ethnic Conflicts: Comparative International Perspectives." *Annual Review of Sociology* 20 (1994): 49-79. 72.

[100] See WALKER CONNOR. "A Nation is a Nation, is A State, is an Ethnic Group, is a…." In *Nationalism*, ed. John Hutchinson and Anthony D. Smith, 36-45. Oxford: Oxford University Press, 1994. 45.

[101] A good example is the "United Nations", whose members are states (see Article 4 UN Charter: "Membership in the United Nations is open to all peace-loving states…").

[102] EIDE, Possible ways and means, paragraph 35 and 36.

[103] VAN EVERA, Hypotheses on Nationalism and War, 26.

[104] See more detailed about the distinction WOLFF, Ethnic Conflict, 32/33.

1.2.1 Origin and Causes of Ethnic Conflict

Neither ethnicity nor nationalism in itself causes ethnic conflict. Rather, the issues at stakes are very diverse, ranging from political, social, cultural, and economic grievances of disadvantaged ethnic minorities to predatory agendas of states and "national security interests". In some cases, ethnicity is only a convenient mechanism to organize and mobilize people into groups that will fight each other for resources that are at best indirectly linked to their ethnic identity.[105] Ethnic conflict arises if the significance of ethnic identity is played out in public rituals of affirmation and contradiction.[106] It is thus important to determine if the conflict is actually about ethnicity or to what extent ethnicity is used for other purposes to organize a group's struggle to gain access to resources, land, and/or power.

The combination of convictions, grievances, and political goals, exacerbated by poor leadership, particularistic interests, and spillovers from conflicts in neighboring countries can lead to conflict or escalation of tensions. Discrimination, the ongoing violation of human rights, and the neglect of social and economic needs of ethnic groups on one side, paired with the ability of leaders to streamline the feeling of ethnic differentness, grievances, and expectance of material gains of the affected communities on the other, are among the most important causes of ethnic conflict.[107] The report of a workshop organized by the Office of the UN High Commissioner for Human Rights (OHCHR) in 2005 stated the following root causes for ethnic conflict: competition for limited natural resources, discriminatory national legislation that does not recognize minorities, lack of opportunities for ethnic minority groups to participate in decision making bodies and non-consultation on issues affecting their affairs, weakening of traditional forms of dispute settlement (such as "council of elders"), religious intolerance, poverty, gross human rights violations by governments and multi-national corporations, institutionalized racial exclusion, unfair distribution of resources and infrastructure, leadership tussle, forced evictions by the government, failure of governments and the international community to react to early warning signals, denial of

[105] Ibid., 64/65.
[106] DONALD L. HOROWITZ. *Ethnic Groups in Conflict*. Berkeley, CA: University of California Press, 1985. 227.
[107] WOLFF, Ethnic Conflict, 63.

internal self-determination, lack of social services and social security, unfair justice system, inferiority of the minority language, and fighting for group identity.[108]

Violence does not spontaneously erupt between peacefully co-existing groups. Power struggles, the opportunity for material gains, and other factors contribute to the escalation of tensions into violent conflict.[109] When ethnicity is linked with acute social uncertainty, a history of conflict, and fear of the future, ethnic conflict is possible. Collective fears of the future arise when the state looses its ability to arbitrate between groups and provide credible guarantees of protection for minorities.[110] Ethnic minorities in some cases decide to wage a violent struggle to assure that there is some engagement by the international community, which will help them to achieve their goal.[111] Thus, the reason for the use of violence is not the belief that violence will settle the dispute as such, but the hope of political gains and international support. This strategy assumes the willingness of the international community to react and to provide a political forum to support negotiation, arbitration, and the settlement of disputes. The assumption of intervention by the international community can, in the worst case, cause the very tragedies international engagement in ethnic conflict tries to prevent. By counting the international community's promise to intervene, ethnic groups decide to provoke attacks on civilians and start a cycle of tremendous human suffering.[112]

Focusing on internal conflict, MICHAEL BROWN distinguishes between underlying and proximate causes. Underlying causes include structural factors, political factors,

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[108] Report on the Workshop on Minorities and Conflict Prevention and Resolution. http://www.ohchr.org/english/issues/minorities/seminar.htm

[109] See for an overview ERIKSSON, WALLENSTEEN, and SOLLENBERG, Armed Conflict, 1989-2003, 625-636.

[110] DAVID A. LAKE and DONALD ROTHCHILD. "Containing Fear: The Origins and Management of Ethnic Conflict." *International Security* 21/2 (Fall 1996): 41-75. 43.

[111] See Ruth WEDGWOOD. "Limiting the Use of Force in Civil Disputes." In *International Law and Ethnic Conflict*, ed. David Wippman, 242-255. Ithaca, NY/London: Cornell University Press, 1998. 251.

[112] This happened for example in Kosovo: The Kosovar Albanian rebel forces were convinced that if they could provoke the Serbs to attack ethnic Albanians, the international community would intervene on their behalf and thus facilitate their goal of independence. The plan seemed to work out fine: the rebels began shooting large numbers of Serbian police and civilians in 1997, the Serbs responded by bloody counterinsurgency in 1998, NATO bombed the Serbs in 1999, occupying the province and thereby establishing Kosovo's de facto independence. However, both the Serb counterinsurgency and the Albanian attacks on Serbs after Serbia's defeat caused the death and displacement of thousands of people on both sides, thereby leading to the tragedy that could have been prevented. These deaths were a direct consequence of the promise of humanitarian intervention. See ALAN J. KUPERMAN. "Humanitarian Hazard: Revisiting Doctrines of Intervention." *Harvard International Review* 26/1 (Spring 2004): http://hir.harvard.edu/articles/1219/.

economic/social factors, and cultural/perceptual factors. Proximate causes embrace four levels of triggering conflict: by internal, mass-level factors (bad domestic problems); by external, mass-level factors (bad neighborhoods); by external-elite level factors (bad neighbors); and by internal, elite-level factors (bad leaders).[113]

The four categories of underlying causes can be further divided into several sub-topics, listed in the table below.

Table 1: Underlying causes of ethnic conflicts[114]

Structural Factors	Political Factors	Economic/Social Factors	Cultural/Perceptual Factors
• Weak states • Intra-security concerns • Ethnic geography	• Discriminatory political institutions • Exclusionary national ideologies • Inter-group politics • Elite politics	• Economic problems • Discriminatory economic systems • Economic development and modernization	•Patterns of cultural discrimination •Problematic group histories

Structural factors. Weak states or failed states are often a starting point for ethnic conflict. Most of these states are artificial products (e.g., former colonies) and lack political legitimacy, ethnically sensible borders, and effective political and legal institutions that are in control of the territory under their jurisdiction. External developments such as the reduction of foreign aid as well as internal problems such as corruption, administrative incompetence, and the inability to promote economic development contribute to state failure and start a process of economic decline. If this process is associated with the deterioration of the political situation in the country, these developments can, in the worst case, lead to violent conflict.

Second, violent ethnic conflict is often accompanied by massive human rights violations, refugee flows, and spillover effects that can destabilize the whole region. Ethnic minority groups are especially vulnerable in uncertain and unstable conditions, which may compel them to provide for their own defense. Furthermore, group rivalry can lead to military mobilization, which leads to general armament of all ethnic groups within the state. This causes a security dilemma; by taking steps to defend themselves, ethnic groups often

[113] BROWN, Ethnic and Internal Conflicts, 214-218.

[114] Adapted from MICHAEL E. BROWN. "The Causes of Internal Conflict: An Overview." In *Nationalism and Ethnic Conflict*, ed. Michael E. Brown et al., 3-25. Cambridge, MA: The MIT Press, 2001. 5.

threaten the security of others (see below).[115] Against this background, ethnic movements and nationalism are driven by the need to supply recruits for armies, and are thus more extreme in newer and poorer countries which lack the capacity to establish high-technology forces and rely on manpower-intensive forces.[116] Furthermore, military capability acquired for defense can also be used for offensive attacks.[117]

Ethnic geography, meaning the geographic distribution and territorial concentration of ethnic groups in pluralistic states, is a third factor that contributes to violent ethnic conflict. A country is especially prone to ethnic conflict if groups are territorially concentrated, located near a border, and/or have ethnic kin in an adjacent state.[118] It is easier for the group to mobilize for ethnopolitical action if most of the group shares a common homeland that serves as a territorial base and provides the group with the resources needed for the struggle. Contacts with other groups located in adjacent countries are facilitated by geographical proximity.[119]

Political factors. First, the occurrence of violent conflict depends to some degree on the type and fairness of the political system. Closed, authoritarian regimes, which do not take into account the interests of ethnic minorities, are likely to be resented and protested against. Even in more democratic settings, resentment and protest can occur if ethnic groups are inadequately represented in the government, the courts, the police, the military, political parties, and other public and political institutions. The legitimacy of these types of regimes is questionable. The use of violence against protesters in time of political transition is often employed by states, which results in the further deterioration of the situation.[120]

Exclusionary national ideologies are a second reason for violent conflict. Nationalism and, in an increased form, citizenship based on ethnic distinctions are especially dangerous

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[115] BARRY A. POSEN. "The Security Dilemma and Ethnic Conflict." In *Ethnic Conflict and International Security*, ed. Michael E. Brown, 103-124. Princeton: Princeton University Press, 1993. See also ESMAN, Ethnic Politics, 244-245.

[116] POSEN, Security Dilemma and Ethnic Conflict, 106/107.

[117] Ibid., 108/111. POSEN argues that the breakup of multi-ethnic states usually leaves one group with the opportunity to possess most of the state's military assets, while other groups, which were initially defenseless, feel threatened and as a consequence rapidly mobilize their own military abilities.

[118] See more detailed BROWN, Causes of Internal Conflict, 5-8.

[119] See GURR, Minorities and Nationalists, 171-173.

[120] See TED ROBERT GURR and BARBARA HARFF, Ethnic Conflict and World Politics.Boulder, CO: Westview, 2003[2]. 95-116.

because such ideologies "predominate when institutions collapse, when existing institutions are not fulfilling people's basic needs, and when satisfactory alternative structures are not readily available."[121] Exclusionary national ideologies must not be based on ethnicity. Religious fundamentalism is another phenomenon leading to exclusionary nationalist ideologies.[122]

Third, the occurrence of violent ethnic conflict depends on domestic, inter-group relations.[123] The potential for violence is increased with a heightened sense of identity, ambitious claims, and highly provoking group strategies. Conflict is especially likely if the claims are incompatible, groups are strong and organized, action is possible, success is achievable, and the fear of suppression and discrimination is tangible.[124] Changes in inter-group balance can be especially destabilizing.

Finally, the tactics employed by leaders and elites during political turmoil can influence the behavior of ethnic groups. Ethnic bashing and scapegoating, hate speech, and instrumentalization of the mass media are means that are used to further aggravate ethnic tensions.[125]

Economic and social factors. Economic problems can contribute to intra-state tensions. Transitions from centrally-planned to market economies, as were the case in countries in Eastern Europe and the former Soviet Union, have created many economic problems, ranging from very high levels of unemployment to resource competition and massive inflation.[126] Many developing countries are in a semi-permanent state of economic failure. Economic slowdowns, stagnation, deterioration, and collapse are a source for destabilization of the state and can lead to increased tensions.

As a second cause, discriminatory economic systems on the basis of ethnicity can generate resentment and contribute to ethnic tensions. Discriminatory economic

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[121] JACK SNYDER. "Nationalism and the Crisis of the Post-Soviet State." *Survival* 35/1 (Spring 1993): 5-26. 11.
[122] See BROWN, Ethnic and Internal Conflicts, 16.
[123] See HOROWITZ, Ethnic Groups in Conflict and GURR/HARFF, Ethnic Conflict and World Politics.
[124] BROWN, Ethnic and Internal Conflicts, 17.
[125] BROWN, Causes of Internal Conflict, 8-10. The case of Milosevic strikingly illustrates this statement: By using national media, Milosevic fueled nationalist movements and hate towards non-Serbian groups. He relied on extremists in his government, which further complicated the situation.
[126] For a general discussion and several case studies see SHALE A. HOROWITZ. *From Ethnic Conflict to Stillborn Reform: The Former Soviet Union and Yugoslavia*. College Station, TX: Texas A&M University Press, 2005.

opportunities, unequal access to land and resources, and vast differences in the standard of living can aggravate the situation.

Third, economic development and modernization are roots for instability and conflict as they bring about a variety of social changes. Migration into cities, and consequently urbanization, better education, higher literacy rates, and improved access to mass media raise awareness of where people stand in society. These changes also raise economic and political expectations that can provoke frustration if these expectations are not met.[127]

Cultural/perceptual factors. Cultural discrimination of minorities, including unequal educational opportunities, legal and political limitations for using the minority language, and constraints on religious and cultural practices, is a factor for ethnic conflict. Attempts to force minorities to assimilate to the majority culture and the denial of the existence of the minority are among the most common practices of states.[128]

Second, problematic group histories, stereotypical perceptions, and grievances can lead to conflict. Groups tend to whitewash and glorify their own history while at the same time demonizing the actions of other groups and creating enemy images. What starts out as a story or a rumor can become distorted and exaggerated over time, and finally be treated as "truth" by members of the group.[129]

Regarding proximate causes, BROWN categorizes internal conflict according to (1) whether they are triggered by elite-level or mass-level factors, and (2) whether they are triggered by internal or external developments. He identifies four main types of internal conflict, summarized in the table below.

Table 2: Proximate causes of ethnic conflict[130]

	Internally-driven	**Externally-driven**
Elite-triggered	• Bad leaders	• Bad neighbors
Mass-triggered	• Bad domestic problems	• Bad neighborhoods

[127] BROWN, Causes of Internal Conflict, 10-12.
[128] This is in extreme cases referred to as "cultural genocide".
[129] BROWN, Causes of Internal Conflict, 12/13.
[130] Ibid., 15.

Internal mass-level factors create bad domestic problems such as rapid economic development, modernization, patterns of political or economic discrimination, and internal migration (urbanization). Refugees or fighters from neighboring countries who cross the border often bring violence and turmoil with them. Radicalized politics can cross borders (contagion, diffusion, spillover effects) and create "bad neighborhoods" (external mass-level causes). For instance, the Hutu refugee camps in Zaire became a base for recruitment of Hutu for rebel operations in Tutsi-controlled Rwanda. External elite-level factors are the results of decisions by governments to trigger conflicts in weak neighboring states for political, economic, security, or ideological reasons, for example Russian involvement in Georgia (Abkhazia, South Ossetia). Internal elite-level aspects include power struggles by leaders of different groups, ideological contests on how a country should be organized (Peru, Algeria), and criminal assaults (Colombia).[131]

Security dilemmas and the rational choice of individuals, weighing the costs and benefits for their actions, shape strategic interactions among elites. Strategic interaction between groups can cause three strategic dilemmas leading to violence: information failures, problems of credible commitment, and incentives to use force preemptively (security dilemma). As for within-group strategic interactions, ethnic activists and political extremists try to outbid moderate politicians, thereby mobilizing members, polarizing society, and increasing the strategic inter-group dilemmas.[132] What may have started in the private and social sphere may spread to the economic and political spheres and thus create discriminatory systems in all parts of daily life.[133] Ethnic conflict occurs if the incentive for the use of violence is sufficiently large relative to its costs.[134]

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[131] BROWN, Ethnic and Internal Conflicts, 218-220.

[132] TIMUR KURAN. "Ethnic Dissimilation and Its International Diffusion." In *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation*, ed. David A. Lake and Donald Rothchild, 35-60. Princeton, NJ: Princeton University Press, 1998.

[133] WOLFF, Ethnic Conflict, 83.

[134] See for an overview PAUL COLLIER and ANKE HOEFFLER. "On economic causes of civil war." *Oxford Economic Papers* 50 (1998): 563-573; PAUL COLLIER and ANKE HOEFFLER. "Greed and Grievance in Civil War." *World Bank Research Paper* 2001, http://www.worldbank.org/research/conflict/papers/greedgrievance_23oct.pdf.; and KAREN BALLENTINE and JAKE SHERMAN. *The Political Economy of Armed Conflict: Beyond Greed and Grievance*. Boulder, CO: Lynne Rienner, 2001.

Information failures arise when two or more ethnic groups compete in the political arena. Groups often have in-group information and incentives to misrepresent these facts to exaggerate their strengths, minimize their weaknesses, and misstate their preferences in order to get a more favorable deal from inter-group negotiations. Information failures about the intentions of the other group and the spreading of wrong information can lead to dangerous decisions by group leaders. Spirals of fear can occur in both majorities and minorities and can possibly have destructive consequences such as genocide, ethnic cleansing and expulsion.[135]

Credible commitment-dilemmas arise when groups cannot effectively reassure the other group that it will stick with the provisions of the agreement and it will not try to renegotiate or misinterpret the content. Such problems arise if the balance of ethnic power shifts as an agreement cannot be successfully implemented. Even if the more powerful group promises not to exploit its situation, the declining side might choose to fight to protect itself against potential exploitation in the future.[136]

The most significant strategic dilemma is the security dilemma, which is often increased by proximate factors such as primordial identities, economic decline, regime changes, bad leaders, and the involvement of external forces. Similar to the "traditional" interstate security dilemma in international relations, the ethnic security dilemma is based on the notion of comprehensive security. The intentions of the other community cannot be known with certainty, because "what one does to enhance one's own security causes reactions that, in the end, can make one less secure."[137] The ethnic security dilemma involves aspects of physical security (threats to the existence of the group), political security (oppressive regimes, exclusion from political participation), economic and social security (no equal opportunities of economic and social advancement of the group), cultural security (forced assimilation), and environmental security (destruction of a minority's land and resources).[138] Incentives to

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[135] LAKE and ROTHCHILD, Containing Fear, 46-48.

[136] See JAMES FEARON. "Commitment Problems and the Spread of Ethnic Conflict." In *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation*, ed. David A. Lake and Donald Rothchild, 107-126. Princeton, NJ: Princeton University Press, 1998. The approach was developed in JAMES FEARON. "Rationalist Explanations for War." *International Organization* 49/3 (Summer 1995): 379-414.

[137] POSEN, Security Dilemma and Ethnic Conflict, 104.

[138] WOLFF, Ethnic Conflict, 76/77.

preempt arise when offensive military technologies and strategies dominate more defensive postures, meaning that a first strike might lead to a military advantage.[139]

The conditions in which security dilemmas emerge usually involve at least one of five factors: government breakdown; geographical isolation or vulnerability of a minority within a larger group; shifts in the balance of power between groups; changes in access to, or control over, economic resources; and forced or voluntary demobilization of paramilitary groups.[140] STEFAN WOLFF adds a sixth category: Changes in the patronage of a group or in the balance of power between rival patrons. Patron states do not necessarily have ethnic ties with the groups they protect or lobby for, but they may have a strategic interest in doing so.[141] If such patron states intervene unilaterally rather then seeking agreement with the host state, solutions are unlikely to be permanent and mostly result in stalemates.[142] A settlement becomes feasible only if all states concerned agree on a possible solution.[143]

Ethnic conflicts have, as we have seen, multiple causes ranging from structural, political, economic, social, to cultural-psychological issues, or in most cases, a combination of these. It is important to point out that ethnic identity as such does not lead to conflict. For ethnic disputes to emerge, especially violent ones, several catalysts have to be involved. Bad leaders, ethnic activists, neighboring states, and other external actors play an important role in determining if a dispute between ethnic groups is to become violent.

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[139] This argumentation was first introduced by ROBERT JERVIS. "Cooperation Under the Security Dilemma." *World Politics* 30/2 (January 1978): 167-213.

[140] BARBARA F. WALTER. "Introduction." In *Civil Wars, Insecurity and Intervention*, ed. Barbara F. Walter and Jack Snyder, 1-14. New York, NY: Columbia University Press, 1999. 4-8.

[141] As for example Russia lobbies for Abkhaz minorities in Georgia.

[142] WOLFF, Ethnic Conflict, 74/75.

[143] A point vividly illustrated by the 1998 Good Friday Agreement in Northern Ireland. The 1985 Anglo-Irish Agreement was the first agreement between the UK and the Republic of Ireland. It did not, however, involve any of the political parties in Northern Ireland and did not seek dialogue with paramilitary groups. See for a detailed analysis TINA KEMPIN. *Ready for Peace? The Implementation of the Good Friday Agreement in Northern Ireland 1998-2002*. In Zürcher Beiträge zur Sicherheitspolitik und Konfliktforschung, ed. Andreas Wenger, Forschungsstelle für Sicherheitspolitik der ETH Zürich, 2003.

1.2.2 The Character of Ethnic Conflict

Ethnic conflicts can be extremely cruel and involve tremendous human suffering. Violence, rape, torture, and mass killings are among the most used means in ethnic warfare. Their purpose is to terrorize, intimidate, and expel members of the group. Genocide, as the most cruel atrocity of these, has the goal to exterminate the group completely. WOLFF writes: "People are prepared to kill or die because they see themselves as different from others, because they are told that this is a difference of life and death, and because they often only too willingly accept such 'explanations'."[144] MICHAEL IGNATIEFF compares the conditions that prevail in an ethnic conflict to a Hobbesian state of nature, based on the assumption that human beings are "radically insecure, mistrustful of other men, and afraid for his life."[145]

Ethnic conflicts often involve irregular and poorly equipped armed groups, frequently entailing civilians and thus increasing civilian casualties. At the beginning of the 20th century, only about 10 percent of fatalities were civilians. In the Second World War, civilian death tolls rose to about two-thirds of all people killed. By the beginning of the 21st century, more than 90 percent of all victims of violent conflict were civilians.[146] Apart from technological reasons such as the improvement of long-distance missiles and weapons of mass distruction, the major reason for the increase in civilian deaths is the changing nature of war away from battlefields between regular armed forces towards wars affecting the whole society with non-state actors as major players. These wars are fought among and against civilians. This general acceptance of innocent victims, the consequential brutalization of the conflict, and the long-term traumatic effects on the affected societies are some of the most worrying features of this kind of "new war".[147]

Moreover, ethnic violence includes the disruption of humanitarian assistance and widespread destruction of enemy property and territory, which indirectly threatens the

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[144] WOLFF, Ethnic Conflict, 23.

[145] He refers to the Balkan wars: "By 1990, post-Titoist Yugoslavia had become a Hobbesian world, a state of nature in which the means of violence were too widely distributed to afford anyone safety, especially those who found themselves a minority in the successor republics. Interethnic accommodation depended on the existence of a multiethnic state. When this disintegrated, society rapidly decomposed into its primary national elements, since these alone appeared to promise the Hobbesian minimum of security."
MICHAEL IGNATIEFF. "The Balkan Tragedy." *New York Review of Books* 40/9 (May 1993). http://www.nybooks.com/articles/2574.

[146] ERIKSSON, WALLENSTEEN, and SOLLENBERG., Armed Conflict, 1989-2003, 629.

[147] See ALAN J. KUPERMAN. "Next steps in Sudan: To end the violence and to aid refugees, reining in the Darfur rebels is essential." *The Washington Post* of 28 September 2004, A27.

existence of ethnic groups.[148] In many cases, ethnic conflict cannot be treated separately from social, political, and economic instability, terrorism, and organized crime. These challenges often become so closely linked and mutually reinforcing that it is difficult to establish a clear causal relationship. As a result, ethnic conflicts take various forms, involving various actors and factors. Not all cases involve the use of massive violence. The types of action a group can employ range from conventional politics, collective action (strikes, demonstrations, and other non-violent means) to violent acts (terrorism, armed uprisings, guerilla, and civil wars).[149]

Group mobilization for political goals depends on several factors such as the size of the group, its strength, and its distribution; the extent to which competing groups are interdependent; the resources available to them; the history of interactions; the depth of grievances or the extent of the demands made; the role and structure of the state; the presence or absence of reinforcing cleavages along class, religious, cultural, or other lines; and the attitude of outside states.[150] Three factors contribute to the nature, intensity and persistence of ethnic conflict: incentives of the group to engage in ethnic conflict, the capacity for political action, and the probability to reach the group's political aims through the use of violent or non-violent means.

First, incentives to engage in ethnopolitical action can originate from resentment about past disadvantages, fears about future losses, and hopes for relative gains.[151] Members of ethnic minorities are often victims of human rights violations. These include attacks and other forms of ill-treatment, systematic discriminations, exclusion from national and local political decision-making, appropriation of their traditional homelands, and national development policies and practices that seriously affect the social and economic survival of minority communities.[152] Furthermore, ethnic groups with a story of independence, such as the Tibetans in China, will lead to persistent grievances and hopes for restoration. The greater the loss of autonomy and the more recently it occurred, the

[148] WOLFF, Ethnic Conflict, 50.
[149] See DONALD L. HOROWITZ. *The Deadly Ethnic Riot.* Berkeley, CA: University of California Press, 2001. Chapter 1.
[150] WIPPMAN, Introduction, 5.
[151] GURR, Minorities and Nationalists, 169.
[152] HADDEN, International and National Action, paragraph 2.

greater are the incentives to fight to regain past advantages. Attributing injustices to others and proposing solutions are central activities of ethnic movements.[153]

Second, the greater the cohesion and mobilization of the group, the more frequent and sustained is its participation in political action. Three characteristics particularly influence the capacity of a group for political action: regional concentration, the degree of organization within the group, and leadership.[154] Regionally concentrated groups have a territorial base that can be used for recruitment, funding, and retreat. MONCIA DUFFY TOFT argues "if an ethnic group is a majority concentrated in a region of a state, and is located in its homeland, then it is most likely to see control over a particular territory as indivisible, demand independence, and therefore end up in violence."[155] The same arguments are made by FEARON and LAITIN, who also show that groups in urban areas are the least likely to rebel.[156] Cohesion is dependent on high levels of organization and interaction. Preexisting organization and regional concentration strengthen group ties. Established political institutions are usually more cohesive than new ones and can mobilize members at lower cost. Furthermore, the presence of a common language, religion, economic niches, or political establishments facilitate organization and group identity.[157] Leadership, as we have seen in the last chapter, can determine if an ethnic dispute is fought using violent or non-violent means, the degree to which members of the group can be mobilized, and the outcome of negotiations and efforts of dispute settlement.

Third, the opportunities available to an ethnic group to achieve its goals through political action are influenced by the political and social context. The structure of the state and its openness to ethnic claims often determine the political action of the ethnic group (rebellion, protest or participation). Generally, in democracies, the potential for gains is substantial for an ethnic group, especially if the group employs non-violent tactics.[158] Deliberative democratic state structures based on the ideals of inclusion, political debate, and

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[153] See SIDNEY TARROW. *Power in Movements and Contentious Politics*. Cambridge: Cambridge University Press, 1998[2]. 123.

[154] For more details see GURR, Minorities and Nationalists, 171-173.

[155] MONICA DUFFY TOFT. *The Geography of Ethnic Violence: Identity, Interests, and the Indivisibility of Territory*. Princeton, NJ: Princeton University Press, 2003. 11.

[156] FEARON and LAITIN, Ethnicity, Insurgency, and Civil War, 75-90.

[157] GURR, Minorities and Nationalists, 172.

[158] See for an overview of the potential of democratic state structures for minorities STEVEN WHEATLEY. *Democracy, Minorities and International Law*. Cambridge: Cambridge University Press, 2005.

on the attempt to reach consensus among all participants in the political process facilitate non-violent ethnopolitical action and thus prevent rebellion or uprisings.[159] A second factor is the presence of transnational links: they affect mobilization and the opportunities of the group. Political, material, and military support especially can influence the course of an ethnic conflict.[160]

Even if fought on a low level of intensity, protracted ethnic conflicts have a great impact on the affected society. Most influences are negative and include a lack of functioning or legitimate political institutions, weak economic performance, non-existent or polarized structure of civil society, and antagonized elites.[161] Furthermore, human suffering and the trauma of civil war leave long-term traces, which are very difficult to erase. Polarization and separation as well as the erosion of cross-cutting cleavages leave societies deeply divided and prone to further ethnic strife.

1.2.3 The Regional and International Context of Ethnic Conflict

Ethnic conflicts have very direct effects far beyond their epicenters. These involve refugees flows, internal displacement, regional instability, economic failures, environmental disasters, diffusion effects, and establishing the conditions for organized crime and terrorism.[162] Neighboring countries are often overwhelmed and get drawn into the downward spiral following ethnic turmoil. However, neighboring states, regional and international powers as well as international organizations, which pursue their own interests, directly influence the outcome and dynamics of ethnic conflict. Neighboring states and the international community can thus be the victims of the troubles in the region or active contributors – sometimes deliberately, in other cases unintentionally – by providing military, economic, or political support of ethnic groups or engaging in negotiation and peace implementation.

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[159] See KAUFMANN, Possible and Impossible Solutions, 465.
[160] See below.
[161] WOLFF, Ethnic Conflict, 158.
[162] Ibid., 16.

Many ethnic conflicts start out as intrastate disputes and then become regional or international crises when foreign powers get involved. Regional instability is as much a source as a consequence of ethnic conflict. Extensive refugee flows caused by ethnic conflict can destabilize the ethnic demographics in a neighboring country and thus lead to another conflict with ethnic dimensions.[163] Furthermore, legal uncertainty and political chaos benefit the growth of organized crime. Human trafficking, forced prostitution, illegal immigration, drug smuggling, and the proliferation of small arms are among the most common criminal issues following ethnic conflict. Organized crime is one of the major sources of financing ethnic conflict.[164]

In some cases, trouble spills over into neighboring countries. Ethnic conflicts spread in two ways: Diffusion occurs when an ethnic conflict in one state stimulates conflict in another state with similar conditions. Successful movements provide images and moral incentives resulting in the motivation and mobilization of other ethnic movements. This is particularly true for communities with more or less the same economic and political conditions.[165]

Escalation or contagion effects occur when a conflict in one country spreads across borders into neighboring countries in which an ethnic minority has its kinfolk. This usually involves the engagement of new foreign fighters that are employed by local elites. Many of the fighters in the Democratic Republic of the Congo (DRC) are combatants from neighboring countries, many of the rebels in Chechnya have fought in Abkhazia before, and different armed groups in Sudan are pursuing their goals with violence after having learned that a favorable peace deal can be brought about by using violent means.

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[163] This happened for example in the Democratic Republic of the Congo (DRC) after the Rwandan genocide. Millions of Hutus fled to the DRC (former Zaire) in fear of revenge, thereby turning the already fragile and tense situation in the DRC into chaos. The refugee camps became suppliers for recruitment for the rebel groups, organized crime, and illegal trade. Furthermore, the humanitarian aid provided by the UN led to tensions between the refugees and the local population that further heightened the probability for violent conflict.

[164] The exploitation and smuggling of resources such as diamonds, precious metals, and ivory in Africa is one of the major sources of conflicts in countries like Sierra Leone, Liberia, and Angola. See UN GA Resolution, Role of Diamonds Fueling Conflict, UN Doc. A/RES/55/56 (2004).

[165] See STEPHEN M. SAIDEMAN. "Is Pandora's Box Half-Empty or Half-Full? The Limited Virulence of Secessionism and the Domestic Sources of Disintegration." In *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation*, ed. David Lake and Donald Rothchild. Princeton: Princeton University Press, 1998. 127-150.

On the other side, international actors and neighboring countries are not only passive victims. International organizations, neighboring states, and regional as well as world powers all have their own interests in particular conflicts. Foreign sympathizers can contribute substantially to the group's cohesion and mobilization by providing financial, military, political, and moral support. If the state is weak, it often seeks outside help to meet the challenges – in many cases, it asks for military support. A real problem arises if two states support two different ethnic groups in a conflict. These conflicts are often very violent and can only be ended if and when it is in the interest of the external powers.[166] Not only states but also rebels or rioting groups search for outside help. We know of several examples of connections between paramilitary organizations or between paramilitaries and so-called "rogue states".[167]

Furthermore, diasporas are a significant and growing source of external support for ethnonationalists.[168] Irish-American organizations in the United States or the Kurdish Worker's Party in Europe have substantially contributed to the conflicts in their homelands. The same is true for the Palestinians who are dispersed throughout the Arab world and seek support from their own kin and other Arabs for their national interests.

The international community or neighboring states can choose to intervene in ethnic conflicts. Outside intervention can have various motivations: humanitarian interventions to relieve suffering and restore peace and stability;[169] defensive interventions to uphold national security interests; protective interventions in aid of ethnic kinfolk who are being persecuted; opportunistic intervention to gain military, economic or political benefits; or opportunistic invasions that take advantage of a conflict-affected state.[170] Many external actions are driven by a combination of considerations. International actors have many different policy

[166] Before the peace talks in Northern Ireland, the British and Irish government worked against each other. With the beginning of the peace talks and especially after the signing of the Good Friday Agreement in 1998, the two governments worked together in a search for a peaceful settlement. Despite many setbacks, it was possible to achieve progress and a relaxation of tensions between the Protestant and Catholic communities. For a detailed analysis of the roles of the British and Irish government in the implementation process of the Good Friday Agreement see KEMPIN, Ready for Peace.

[167] In the conflict in Northern Ireland, for example, Libya supported the Irish Republican Army (IRA) by delivering high technological weaponry to the paramilitaries. See Ibid., 117.

[168] See for example CHARLES KING and NEIL J. MELVIN. "Diaspora Politics: Ethnic Linkages, Foreign Policy, and Security in Eurasia." *International Security* 24/3 (Winter 1999/2000): 108-138.

[169] See below.

[170] BROWN, Ethnic and Internal Conflicts, 213.

instruments for interfering in ethnic conflicts: humanitarian assistance, fact-finding, mediation, confidence-building measures, peacekeeping operations, military and economic assistance, arms embargos and economic sanctions, and the norms of international law as well as conflict-resolution tools.[171]

International involvement can be crucial in organizing and supervising ceasefires, implementing the provisions of peace settlements, and in providing mechanisms to arbitrate future disputes with peaceful means. The UN role is traditionally limited to the maintenance of international peace and security, with "international" meaning a cross-border element, e.g., border transgression, external support for intrastate warfare, refugee flows, and political and economic spillover effects.[172]

Foreign governments or even individuals as neutral mediators can also have a great effect on conflict resolution. The mediation by the Clinton administration in the Palestine-Israeli conflict or the role of former US-Senator GEORGE MITCHELL in Northern Ireland helped to broker an agreement between the parties.[173]

International actors have many incentives to prevent ethnic conflicts or to seek resolution of a conflict at an early stage. One is to avoid the external effects of ethnic conflicts as described above. The experiences in the Balkan region illustrate this motivation quite clearly. A second reason for the international community to become involved in ethnic conflict management is an economic one: international trade and investments in a globalized economy are dependent on political stability. Third, the lobbying of NGOs or other activists puts international actors under pressure to act. And finally, processes like the European integration can accelerate peace processes because of the development of new identities and the erosion of the significance of borders.[174]

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[171] For a detailed discussion of these policy instruments, see MICHAEL E. BROWN and CHANTAL DE JONGE OUDRAAT. "Internal Conflict and International Action: An Overview." In *Nationalism and Ethnic Conflict*, ed. Michael Brown et. al., 163-192. Cambridge (MA): MIT Press, 2001. 163.

[172] GARETH EVANS. "Cooperative Security and Intrastate Conflict:" *Foreign Policy* 96 (Autumn 1994): 3-20. 8.

[173] See GEORGE MITCHELL. *Making Peace*. Berkeley: University of California Press, 2001. For the role of the Clinton administration in the Palestine-Israeli conflict, see MARKUS KAIM. *Macht oder Ohnmacht der USA im Nahen Osten? : die Politik der Clinton-Administration im israelisch-palästinensischen Konflikt*. Frankfurt am Main: HSFK, 1999.

[174] In Northern Ireland, for example, there was hope that through European integration, the border between Ireland and Northern Ireland would be no more than a county border, and thus would loose importance. However, both sides used this argument for their own purposes. Catholics, who seek the unification of Northern Ireland with the Republic of Ireland, argued that the EU weakens sovereignty claims throughout Europe – a fact that should make Protestants find a united Ireland less objectionable. The Protestants, on

1.3 Conclusion

Ethnic conflict is a very complex phenomenon that touches upon a wide range of issues in international law. Human rights, state sovereignty, and the question about what rights ethnic groups are entitled to are only the most important matters. Two main issues have been discussed in this chapter: the problems of defining ethnic groups and the origin, character, and international context of ethnic conflict.

Regarding the definition of ethnic groups and minorities, no internationally accepted or interdisciplinary definition has been found. However, both political and social scientists as well as international lawyers agree on the most important points. The combination of objective criteria, self-identification, and recognition by the other members of the group is widely acknowledged.

The absence of clear definition has considerable consequences for research. Concerning ethnic conflict research, the lack of a clear definition leads to differences in the examination and interpretation of empirical data. Depending on the criteria used by researchers, results vary widely. Taking for example estimations of how many ethnic minorities exist worldwide, numbers lie between three thousand and nine thousand ethnic groups.[175]

In international law, the lack of a definition has even graver consequences. It is impossible to clearly determine in all cases who benefits from protection. This leads to uncertainty, arbitrary outcomes, randomness in the application of minority rights, and in the worst case misuse. It is not enough to define the existence of a minority as a matter of fact, which is often done in practice. There is a need to establish legal implications involving the concept of "minorities" and "ethnic groups".

Several distinct types of ethnic conflicts exist, varying in the composition and proportions of minorities involved and the underlying and proximate causes that led to the conflict. As a result, there is no single factor, set of factors, or a certain constellation that

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the other side, take the view that the dilution of nationhood through the integration process makes Irish unity a dead aim. KEMPIN, Ready for Peace, 95.

[175] See JAMES MINAHAN. *Encyclopaedia of the Stateless Nations: Ethnic and National Groups around the World.* Westport: Greenwood Press, 2002.

explains the emergence and course of an ethnic conflict. Furthermore, ethnic conflict can take different forms, ranging from political action to violence and gross human rights violations, including mass killing and genocide. The consequences especially of violent and high intensity ethnic conflicts include tremendous human suffering and can affect a society for generations.

In the context of today's interdependent world, ethnic conflicts have gained significance because they can no longer be treated as a domestic problem of a state since they affect the regional and, in some cases, the international level. Furthermore, instability, refugee flows, the fact that conflict zones provide safe havens for international terrorist networks, and other international consequences guarantee that ethnic conflict remains an issue on the international agenda.

Given the complexity of ethnic conflicts there is no "silver bullet solution" to ethnic conflict. The international community will have to rethink the foundations for international responses, especially regarding preventive strategies (as distinct from reactive or corrective) and the organizational reform within the UN. Given the fact that it is the broader purpose of the UN "to maintain international peace and security" and "to reaffirm faith in human rights"[176], it is the task of the UN to deal with ethnic conflict, its consequences, and the protection of ethnic minorities.

[176] Article 1 of the UN Charter.

2. The International Legal Context of Ethnic Conflict: A Human Rights Approach

Ethnic conflict *per se* does not necessarily violate international law or, more specifically, human rights or the rights of ethnic minority groups. A number of international instruments provide the possibility of derogation from certain rights in times of emergency and international human rights instruments do not include the goal of ending all wars. In the same way, international humanitarian law is about the rules of warfare and not about the legality of the war itself. While human rights norms do not prohibit war, they continue to apply during conflicts, whether it is an armed conflict, guerilla warfare, ethnic conflict, or terrorist attack. Thus, the existence of a conflict does not lessen the need of protection of human rights for ethnic minorities, but on the contrary, as UN Secretary-General (UNSG) KOFI ANNAN stated in his commencement address at Harvard University in June 2004: "It is in times of fear and anger, even more than in times of peace and tranquility, that you need universal human rights, and a spirit of mutual respect."[177]

To understand how ethnic conflict is addressed by international law and why there is still a lack of mechanisms for protection and dealing with conflict, it is essential to introduce some of the basic concepts shaping international law. The following chapter analyzes the conflict between the international law of states, the rights of individuals, the rights of groups, and the justification of minority protection under international law.

2.1 The Justification of the Protection of Ethnic Groups in International Law

The most important aim of protection of ethnic groups is stated in the PCIJ advisory opinion in the *Minority Schools in Albania*[178] case (1935). The court states:

> The idea underlying the treaties for the protection of minorities is to secure for certain elements incorporated in a State, the population of which differs from them in race, language

[177] Three Crises – Collective Security, Global Security, Intolerance – Test UN System, US Leadership, Says Secretary-General at Harvard Commencement, UN Press Release SG/SM/9357, 10 June 2004.
[178] PCIJ Advisory Opinion, *Minority Schools in Albania* (1935), PCIJ Series A/B, No. 64, 1935.

> or religion, the possibility of *living peaceably* alongside that populations and *co-operating amicably* with it, while at the same time *preserving the characteristics* which distinguish them from the majority, and satisfying the ensuing special needs.[179] (Author's emphasis)

The Human Rights Committee, reviewing the implementation of the ICCPR, confirmed this view in its General Comment No. 23 on Article 27 of the ICCPR regarding minority rights:

> The protection of these rights [under Article 27] is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.[180]

In general, the emphasis of minority protection is on the recognition of the typically vulnerable position of ethnic minority groups vis-à-vis the dominant population. As described above, suppression, denial of rights, and ethnic conflict can have severe consequences for ethnic groups as well as in the regional and international context. Special protection for a group is needed when the group is subject to injustice, namely when the rights of the whole group and each member's individual human rights are violated. The justification of the protection of ethnic minorities is thus based on three concepts: the maintenance of peace and security, respect of human dignity, and the preservation of culture.[181]

First, ethnic conflict poses a threat to peace and security on the regional and international level. It is thus not surprising that the origin of minority protection is in peace treaties. Recent UN practice confirms the importance of minority protection for peace and security.[182] Furthermore, the provisions in the UN Charter regarding the prohibition of the use of force, equality and non-discrimination provisions, human rights, and the peaceful settlement of disputes are all relevant for the issue of minority protection and for dealing with ethnic conflict. Former UNSG Boutros Boutros-Ghali stated in his Agenda for Peace: "One requirement for solutions to these problems [maintaining peace and security] lies in

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[179] Ibid., 17.

[180] HRC General Comment No. 23, paragraph 9.

[181] See for an overview ATHANASIA SPILIOPOULOU ÅKERMARK. *Justifications of Minority Protection in International Law*. The Hague: Kluwer Law International, 1997. Especially chapter 4, 68-85.

[182] See for example UNSC Resolution 688 (1991) concerning the Kurds in Iraq, UNSC Resolution 751 (1992) creating a mission in order to end starvation and conflict in Somalia, UNSC Resolution 918 (1994) expanding the mandate of the operation in Rwanda to include peace enforcement, and UNSC Resolution 1244 (1999) regarding the establishment of an interim administration for Kosovo.

the commitment to human rights with a special sensitivity to those of minorities, whether ethnic, religious, social or linguistic."[183] He continued that democracy does not only require respect for human rights and fundamental freedoms, but also "a deeper understanding and respect for the rights of minorities."[184]

The second reason justifying the protection of minorities is the respect of human dignity. The preamble of the UN Charter refers to the reaffirmation of "faith in fundamental human rights, in the dignity and worth of the human person" and thus connects human dignity directly with human rights. The preamble of the Universal Declaration of Human Rights (UDHR) speaks of the "inherent dignity … of all members of the human family" and that all human beings are born free and equal "in dignity and rights" (Article 1). Autonomy, integrity, and freedom of human beings as well as individual well-being lie at the core of the concept of human dignity, which permits a dynamic treatment of rights.[185] The protection of minorities and human rights guarantees the individual dignity and well-being of people. Individual well-being in the context of ethnicity is strongly connected with the preservation of ethnic identity and the group's cultural attributes. Granting ethnic groups minority rights promotes human dignity.[186]

The third reason for justification of the protection of ethnic groups is the preservation of culture. Protection of culture is a fundamental value in itself.[187]

2.2 International Human Rights Law and Ethnic Conflict

The realization that minority protection is central to ethnic conflict prevention and justifiable under international law led to the development of a range of norms, instruments, and institutions addressing ethnic conflict and the rights of ethnic groups. Much literature in

[183] An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-Keeping, Report of the Secretary-General of 17 June 1992, UN Doc. A/47/277 - S/24111, paragraph 18.

[184] Agenda for Peace, paragraph 81.

[185] See CARLOS SANTIAGO NINO. *The Ethics of Human Rights*. Oxford: Clarendon, 1994. 178-180.

[186] See also KYMLICKA, Multicultural Citizenship, 75-91, 121-130. He argues that culture provides individuals with "meaningful options" (p. 83), which in turn promotes the individual freedom of human beings and thus human dignity.

[187] See on the preservation of culture in international law A.J.M MILNE. *Human Rights and Human Diversity*. London: Macmillan, 1986. 83. See more general about the relationship of culture and international law MARTIN PHILLIP WYSS. *Kultur als eine Dimension der Völkerrechtsordnung: Vom Kulturgüterschutz zur internationalen kulturellen Kooperation*. Schweizer Studien zum Internationalen Recht, Bd. 79. Zürich: Schulthess, 1992.

politics, philosophy, and law focused on the question of whether priority in terms of recognition and protection through international law should be given to the individual or the community. Communitarians emphasize the social dimension of the individual and describe the rights of a person in relation to other individuals and groups. Darlene Johnston, for example, is of the opinion that the existence of "collective wrongs such as apartheid and genocide demonstrate the need for collective rights."[188]

In legal terms, group rights are assigned to a group of people and can only be invoked by the group as a whole or its authorized agents.[189] Some international scholars reject the notion of group rights because group rights might pose a threat to the territorial integrity of states or to individual rights. Others accept group rights on empirical grounds, namely that both national and international law recognize certain groups in specific situations. Given the fact that minority and peoples' rights are part of the bigger human rights complex, it is undeniable that collective rights do not fit well into the individualistic and egalitarian human rights framework. Consequently, only few rights can be viewed as group rights. The right to self-determination falls in this category (see below) as well as the right to be protected against genocide. The HRC confirmed in the case of *Apirana Mahuika et al. v. New Zealand* that, unlike minority rights, self-determination under Article 1 of the ICCPR is not a right recognizable under the First Optional Protocol (individual complaints procedure).[190] In recent years, rights concerning indigenous peoples have become increasingly recognized as group rights. So-called "third generation rights" or "solidarity rights", such as the right of peoples to peace or development, are often seen as group rights that do not constitute a threat to either territorial integrity of states or individual rights.[191]

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[188] DARLENE JOHNSTON. "Native Rights and Collective Rights: A Question of Self-Preservation." *Canadian Journal of Law and Jurisprudence* 2 (1989): 19-34.

[189] FERNANDO R. TÉSON. "Ethnicity, Human Rights and Self-Determination." In *International Law and Ethnic Conflict*, ed. David Wippman, 86-111. Ithaca and London: Cornell University Press, 1998. 101.

[190] The HRC states "that the Committee has no jurisdiction to consider claims regarding the rights contained in Article 1. Those rights have long been recognised as collective rights. Therefore, they fall outside the Committee's mandate to consider complaints by individuals, and it is not within the ambit of the Optional Protocol procedures for individuals purporting to represent Maori to raise alleged violations of the collective rights contained in Article 1." *Apirana Mahuika et al. v. New Zealand,* UN Doc. CCPR/C/70/D/547/1993 (2000), paragraph 7.6.

[191] ALAN ROSAS and MARTIN SCHEININ. "Categories and Beneficiaries of Human Rights." In *An Introduction to the International Protection of Human Rights: A Textbook*, ed. Raija Hanski and Markku Suski, 49-60. Abo: Institute for Human Rights, 1999[2]. 55/56.

The discussion about individual and collective rights is important on a philosophical level, but it provides little assistance if the question is about which rights for whom. The crucial question is not if a right is a collective or individual right, but whether the provided rights are sufficient to be applied to ethnic groups and minorities. It is more important to develop a legal definition of what constitutes a minority and the rights they are entitled to.

The UN Charter provides for human rights in several provisions and articles.[192] The UDHR sets a common standard for human rights and fundamental freedoms on the basis of equality of all individuals and the respect for human dignity. The International Covenants[193] emphasize that "the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights."[194] Rights of ethnic groups are addressed in the common Article 1 (right of peoples to self-determination) of the Covenants and in Article 27 of the ICCPR (rights of persons belonging to minorities) as well as in the numerous provisions for equality and non-discrimination.[195]

2.2.1 State Sovereignty and the Right to Self-Determination

The question of what rights ethnic groups enjoy is closely linked to the right of states to sovereignty and territorial integrity. As seen above, ethnic conflict can in some cases severely threaten a state's territorial integrity and sovereignty. The notion of state sovereignty is one of the fundamental principles in international law. Historically, sovereignty is linked to the role of the sovereign, usually the monarch or regional ruler, who had "absolute power" over

[192] UN Charter: Article 1, preamble (UN because "to reaffirm faith in fundamental human rights"), Article 13 (promotion and observance as one general objective of the UNGA), Article 55 and 56 (observance of HR as a specific obligation of the UN and its member states); Article 10 (UNGA has an open-ended mandate to discuss and recommend on human rights matters); Chapters V, VI and VII (UNSC can also address issues evolving around human rights violations if they constitute a threat to international peace and security.

[193] The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ISESCR).

[194] Preamble of the ICCPR. The preamble of the ICESCR mentions the rights in different order, emphasizing the economic, social, and cultural rights.

[195] For example Article 1, paragraph 3 and Article 55 of the UN Charter, Article 2 of the UDHR, and Article 2, 25, and 26 of the ICCPR, and Article 2 ICESCR.

his territory.[196] The Treaty of Westphalia, ending the Thirty Years War between Protestants and Catholics in Europe in 1648, is usually considered the beginning of the modern era of the international political order. The treaty is based on the concept of equal and sovereign states; each legally entitled to govern its own territory and its population free from external influence. Sovereignty meant that each state could choose its own religion without outside intervention; but the Treaty of Westphalia also included provisions calling for the protection of Catholics in Protestant states and vice versa.[197]

The principle of state sovereignty is stipulated in Article 2, paragraph 1 of the UN Charter. Sovereignty of states is linked with independence from outside interference ("domestic jurisdiction" principle, Article 2, paragraph 7 of the UN Charter) and the possibility to determine one's destiny. International law has increasingly imposed limitations on the sovereign actions of states both on the internal and domestic level, for example by prohibiting the use of force (Article 2, paragraph 4 of the UN Charter). Furthermore, the development of international human rights law led to a gradual erosion of the "domestic jurisdiction" principle. As JAMES S. ANAYA noted: "Notions of state sovereignty, although still very much alive in international law, are ever more yielding to an overarching normative trend defined by visions of world peace, stability, and human rights."[198]

The concept of self-determination originated from the French and American revolutions in the late 18th century and embraced the notions of sovereignty of the citizens, individual freedom, and a representative government. It also included the idea of the "nation state", namely that the state should consist of a homogenous ethnic community, an idea that significantly influenced state-building in Europe during the 19th century. After the First World War, the principle of self-determination was seen as the basis for democracy within a nationalist framework, which was understood as a regime based on the general consent of the governed. The meaning of self-determination as the right of peoples to freely choose their destiny did not play a major role in the Versailles Peace Treaties or in the context of the

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[196] For a more detailed discussion see PENTASSUGLIA, State Sovereignty, 304-307.

[197] See RANDALL LESAFFER. "Peace Treaties from Lodi to Westphalia." In *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One*, ed. Randall Lesaffer, 9-44. Cambridge: Cambridge University Press, 2004.

[198] See JAMES S. ANAYA. *Indigenous Peoples in International Law*. New York and Oxford: Oxford University Press, 2004[2]. 42.

League of Nations, as admission to the League's bodies required "full self-government" of applicants.

However, this notion of linking self-determination to a ethnically homogenous nation state soon caused problems as less than 20 percent of all states are ethnically homogenous.[199] As a consequence, a large number of ethnic groups were not satisfied with self-determination. The establishment of minority protection under the League of Nations regimes was basically a way to handle this impasse. As a consequence, the concept of self-determination had only limited impact in practice and did not become part of customary law.[200]

Self-determination became a legal right only after the Second World War. In the context of universal peace requiring friendly relations between states, the principle of self-determination of peoples became an integral part of the UN Charter (Article 1, paragraph 2). In this context, "self-determination of peoples" meant that the rights of peoples of one state were to be protected from interference by other states, with self-determination being a right of states, not individuals or substate groups. However, nothing in the UN Charter actually prohibited the emergence of a norm that went beyond non-interference and that included the right for peoples to determine their own destiny even on the substate level.[201]

The right to self-determination gained importance during decolonization struggles in the 1950s and 1960s. In this context, self-determination did not only refer to the right of states to determine their domestic affairs without external interference, but also to the right to independence for colonial peoples and to integrate or associate with an established state. The recognition of the right to self-determination as a legal right in the context of decolonization was confirmed by important UN General Assembly (UNGA) resolutions[202]

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[199] WELSH, Domestic Politics and Ethnic Conflict, 45.

[200] The League of Nations Commission of Jurists did not consider the principle of self-determination "as sufficient to put upon the same footing as a positive rule of the Law of Nations." See the Commission of Jurists decision on the position of the Swedish-speaking population on the Åland Islands. In *League of Nations Official Journal* 1 (1920): Special Supplement 3, 5.

[201] ROSALYN HIGGINS. *Problems and Process: International Law and How We Use It.* Oxford: Clarendon Press, 1994. 112-114.

[202] UNGA Resolution 1514 (XV), Declaration on the granting of independence to colonial countries and peoples, UN Doc. A/RES/1514 (XV), and UNGA Resolution 1541 (XV), Principles which should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for under Article 73 e of the Charter, UN Doc. A/RES/1541 (XV), both 1960.

as well as by the International Court of Justice (ICJ) advisory opinions on *Namibia* (1971),[203] *Western Sahara* (1975),[204] and in its judgment concerning the *East Timor* case (1995).[205]

These developments laid the basis for the recognition of the right to self-determination outside the colonial context. The UN Friendly Relations Declaration states that "subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle." The declaration does not distinguish between colonial peoples and peoples in other context. Also the common Article 1 of the 1966 international human rights covenants states

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

For the first time, self-determination was recognized as a free standing right in a human rights instrument. It was quickly included in other international documents dealing with minorities and human rights. The 1975 Helsinki Final Act by the Conference for Security and Co-operation in Europe (CSCE) identifies the right of peoples to self-determination in Principle VIII and the 1981 African Charter on Human and Peoples' Rights in Article 20, both also including non-colonial situations. At the end of the Cold War, new instruments acknowledged the importance of self-determination and confirmed its standing among fundamental human rights instruments.[206] The Vienna Declaration and Programme for

[203] ICJ Advisory Opinion, *Namibia* (1971), ICJ Reports 1971, p. 31-32, paragraphs 52-53.
[204] ICJ Advisory Opinion, *Western Sahara* (1975), ICJ Reports 1975, p. 31-33, paragraphs 54-59.
[205] ICJ Judgment in the case concerning *East Timor (Portugal v. Australia)* (1995), ICJ Reports 1995, p. 102, paragraph 29.
[206] Examples include the UN Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23 (1993), Part I.2; the 1990 CSCE Charter of Paris for a New Europe, and the 1995 COE Framework Convention for the Protection of National Minorities, European Treaty Series No. 157.

Action, the final statement of the 1993 World Conference on Human Rights, states in Article 2:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development. … The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

However, the World Conference also confirmed that the right to self-determination "shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."[207]

This is confirmed by other international instruments such as the UN Friendly Relations Declaration, which states:

> Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[208]

These examples show the immanent tension between the concept of self-determination and the principle of state sovereignty. Contemporary debates on self-determination and state sovereignty call for a shift from absolute sovereignty (exclusion of any outside authority) to a more relative and value-dependent notion that contains the capacity to implement international human rights.[209] As former UNSG Boutros Boutros-Ghali stated in his Agenda for Peace:

> The foundation-stone of this work [maintaining peace and security] is and must remain the State. Respect for its fundamental sovereignty and integrity are crucial to any common

[207] Vienna Declaration and Programme for Action, Article 2.

[208] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, the so-called "UN Friendly Relations Declaration", UNGA Resolution 2625 (XXV), UN Doc. A/RES/2625 (1970).

[209] See for example DANIEL THÜRER. "The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State." In *Non-State Actors as New Subjects of International Law: International Law - From the Traditional State Order Towards the Law of the Global Community*, ed. Rainer Hofmann, 37-58. Berlin: Duncker & Humblot, 1999. 38/39.

> international progress. The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality. It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world. Commerce, communications and environmental matters transcend administrative borders; but inside those borders is where individuals carry out the first order of their economic, political and social lives. The United Nations has not closed its door. Yet if every ethnic, religious or linguistic group claimed statehood, there would be no limit to fragmentation, and peace, security and economic well-being for all would become ever more difficult to achieve.[210]

The problems of combining the concept of self-determination with the principle of sovereignty and territorial integrity of states in connection with the uncertainty of who constitutes a "people" entitled to self-determination led to the search of new strategies, in which self-determination would not automatically be connected to independence. The risk of linking the concept of ethnicity to such a potent ideology as that of self-determination and then to legitimize this combination by referring to collective human rights increases the probability of even greater disorder, especially in developing countries.[211] Furthermore, the problem is aggravated by the ethnic mixture in most countries. The idea of an ethnically homogenous nation is based on political imagination rather than the reality of ethnic intermixture. It constitutes a permanent provocation to war.[212]

Furthermore, the right to self-determination can be instrumentalized by several actors. A good example is the break-up of the Socialist Federal Republic of Yugoslavia. Self-determination was the justification for the use of force by the Serbian government to uphold the state; for the provinces' claims to independence, democratic institutions, and the protection of minority rights; and for the separatist claims of minorities living within the provinces.[213]

These developments led to a new notion of self-determination. The post-colonial meaning of self-determination includes the right to have a different identity and to enjoy a

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[210] Agenda for Peace, paragraph 17.

[211] See Mohammed AYOOB. "State Making, State breaking, and State Failure." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson and Pamela Aall, 127-142. Washington, D.C.: United States Institute of Peace Press, 2001. 135.

[212] PFAFF, WILLIAM. "Invitation to War." *Foreign Affairs* 72/3 (Summer 1993): 97-109. 99, 101.

[213] For a detailed analysis, see RAYMOND DETREZ. "The Collapse of Tito's Yugoslavia." In *Searching for Peace in Europe and Eurasia: An Overview of Conflict Prevention and Peacebuilding Activities*, ed. Paul van Tongeren, Hans van de Veen and Juliette Verhoeven, 195-208. London: Lynne Rienner, 2002. For the ethnic dimensions in Bosnia and Herzegovina see SUSAN L. WOODWARD. "Bosnia and Herzegovina." In *Ethnic Conflict in the Post-Soviet World: Case Studies and Analysis*, ed. Leokadia Drobizheva et. al., 15-36.Armonk: M.E. Sharpe, 1996.

meaningful degree of control over the affairs of the group. Thus, self-determination today can be distinguished in external and internal self-determination. While external self-determination embraces secession and independence, internal self-determination has a more domestic focus and is linked to democratic principles of participation. The Committee on the Elimination of Racial Discrimination (CERD) states:

> In respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, i.e. the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in article 5 (c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence, governments are to represent the whole population without distinction as to race, colour, decent, national, or ethnic origins. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation. [214]

The HRC confirmed the internal aspect of self-determination in its General Comment No. 12 on Article 1 of the ICCPR (self-determination). Against this background, self-determination should be viewed as a means to an end with that end being a democratic, participatory political and economic system in which the rights of individuals and the identity of ethnic communities are protected. In most instances, self-determination does not mean statehood or independence, but the assignment of necessary power to ethnic groups for them to control and influence matters of direct relevance to them, while at the same time bearing in mind the legitimate concerns of other segments of the population and the state itself.[215]

In the view of JAMES S. ANAYA, self-determination is increasingly understood as a "configurative principle or framework complemented by the more specific human rights norms that in their totality enjoin the governing institutional order."[216] THOMAS FRANCK

[214] CERD General Recommendation XXI (48) 1996, paragraph 4.
[215] HURST HANNUM. "Rethinking Self-Determination." In *International Law and the Rise of Nations: The State System and the Challenge of Ethnic Groups*, ed. Robert J. Beck and Thomas Ambrosio, 214-249. New York, NY/London: Chatam House, 2002. 243.
[216] ANAYA, Indigenous Peoples in International Law, 77.

goes even further by speaking of an emerging "right to democratic governance".[217] This is supported by ASBJØRN EIDE who concludes that "democracy is thus clearly a part of the right to self-determination. What is less clear is whether groups have a right to some local self-government, or autonomy within the state, on the basis of the right to self-determination."[218]

The primary understanding of the right to self-determination today is based on the reconciliation of the principles of state sovereignty with the protection and promotion of peace and democracy within and among societies. A CERD General Recommendation of 1996 explicitly encourages the clarification of the content of self-determination against the background of minority rights and the non-discrimination provisions in the ICERD.[219] The HRC increasingly considers participation and democratic rights as part of self-determination under Article 1 of the ICCPR.[220] HRC General Comment No. 23 on Article 27 of the ICCPR links minority rights to the peaceful use of the territory and its resources.[221] Also the jurisprudence reflects this opinion: The HRC confirmed in *Apirana Mahuika*[222] and *Diegaardt et al. v. Namibia*[223] that while it had no jurisdiction under the individual complaints procedure to consider self-determination claims under Article 1, the HRC stated that Article 1 nevertheless plays an important role when interpreting other rights protected by the ICCPR, in particular Article 27.

In conclusion, an advanced understanding of self-determination assumes the accommodation of individual and group interests to be less a question of threatening sovereignty as a concept than of responding to international and sub-national claims. The content of self-determination is in constant evolution, which might be marked by new concepts, formulation, and the adoption of new means as a response to the changing environment. The inherent conflict between the traditional understanding of the right to

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[217] THOMAS M. FRANCK. "The Emerging Right to Democratic Governance." *American Journal of International Law* 86 (1992): 46-91.
[218] EIDE, Possible ways and means, paragraph 88.
[219] CERD General Recommendation No. 21: Right to Self-determination, UN Doc. A/51/18 (1996).
[220] See HRC Concluding Comments regarding Canada, Mexico, and Norway. UN Doc. CCPR/C/79/Add. 105, 109, and 112.
[221] With a special emphasis on indigenous minorities. See HRC General Comment No. 23, paragraph 7.
[222] *Apirana Mahuika et al. v. New Zealand*, paragraph 9.2.
[223] *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, HRC Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000), paragraph 10.3.

self-determination of peoples, today often understood as applying also to substate groups, state sovereignty, and territorial integrity led to the realization that self-determination can be difficult to achieve and could lead to conflict. Especially with the increase in ethnic conflicts in the late 1980s and early 1990s, the impasse became more obvious. As a result, the internal aspect of self-determination gained increasing importance. A growing number of documents, international treaties, and institutions are concerned with the rights of ethnic groups that provide an alternative to external self-determination.

The concept of internal self-determination has many similarities with minority rights, which provide an alternative to full self-determination "as a less complete, but less destructive means to satisfy the demands of communal affiliation."[224] The Commission of Jurists argued in a similar way in the Åaland Islands dispute. It declared that self-determination and minority rights "both have a common object – to assure to some national Group the maintenance of its social, ethnical or religious characteristics."[225] It is hoped that by giving the members of ethnic groups the possibility to maintain and express their group identity there is no need to give them their own state.

2.2.2 The Concept of Minority Rights

The first "genuine system" of minority protection was set up under the League of Nations.[226] The arrangements took four forms: (1) special treaties on minorities,[227] (2) special chapters in peace treaties,[228] (3) special conventions,[229] and (4) declarations entered before the council of the League of Nations.[230] For the first time, the treaty obligations were guaranteed through an international organization rather than regional powers.

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[224] WIPPMAN, Introduction, 14/15.

[225] Report of the International Commission of Jurists Entrusted by the Council of the League of Nations with the Task of Giving Advisory Opinion upon the Legal Aspects of the Åaland Islands Question. *League of League of Nations Official Journal* 1 (1920): Special Supplement 3.

[226] See for a history of minority protection since the peace of Westphalia STEPHEN D. KRASNER and DANIEL T. FROATS. "Minority Rights and the Westphalian Model." In *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation*, ed. David A. Lake and Donald Rothchild, 227-250. Princeton, NJ: Princeton University Press, 1998.

[227] Between the allied powers and Poland, Czechoslovakia, and others.

[228] As it was in the case of Austria, Bulgaria, Hungary, and Turkey.

[229] Relating to Upper Silesia and the Memel Territory.

[230] By Finland, Albania, Lithuania, Latvia, Estonia, and Iraq.

The system was, however, not designed for general application, but only for states in which minorities were an issue of particular concern. Unsurprisingly, the approach was resented by the affected states from the beginning and was doomed to failure. First, states considered the League's minority protection regime as an attack on their state sovereignty. Second, the underlying double standard based on the distinction between Eastern and Western European countries – with the Western European states imposing minority treaties on Eastern European countries – led to uncooperative behavior by the states concerned. Third, the termination of the 1919 treaty by Poland in 1934, for example, stayed largely unchallenged by regional powers or the League itself. Fourth, the minorities themselves had no possibility to represent their claims before the League as they could appear neither before council (no *locus standi* for minorities) nor before other bodies concerned. And finally, the minority question was exploited by some states (notably Germany) for their own purposes, which led to general abandonment of minority issues.[231] The context of rising dictatorships, flourishing hate and intolerance, and passionate nationalism led to the collapse of the League of Nations system, making minorities the main victims of the new climate.[232]

After the Second World War, the League of Nations regime of minority protection was rejected because of its lack of generalization, misuse by powerful states, failed political purpose, and limited humanitarian concern.[233] A new protection regime had to be established, this time based on individual human rights and fundamental freedoms. Consequently, neither the UN Charter nor the Universal Declaration of Human Rights (UDHR) contain specific minority provisions. The underlying assumption was that the general prescription of equality and non-discrimination would be enough to secure effective protection of minorities.

Nevertheless, the subject of minority rights was not completely absent. Non-discrimination principles of human rights (as stated e.g. Article 1, paragraph 3, and Article 55, sub-paragraph c of the UN Charter) and the prohibition of genocide by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (thereafter

[231] See for more details PENTASSUGLIA, Minorities in International Law, 26-29.
[232] TENNENT HARRINGTON BAGLEY. *General Principles and Problems in the International Protection of Minorities: A Political Study* . Geneva: Imprimeries Populaires, 1950. 126.
[233] See PATRICK THORNBERRY. *International Law and the Rights of Minorities*. Oxford: Clarendon, 1991. 117.

"Genocide Convention") clearly benefited minorities. However, it was not until the adoption of the ICCPR that minorities got their own provision. Until today, Article 27 of the ICCPR is still the most important provision concerning minorities in international law.

The original draft of Article 27 states that "ethnic, religious, and linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language."[234] The word "minorities" was later replaced by "persons belonging to minorities" as groups lacked international legal personality. Furthermore, there were fears that the recognition of group rights would lead to autonomist and secessionist claims and would pose a threat to both sovereignty of states and rights of individuals. However, in order to maintain the collective element of the provision, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (thereafter "Sub-Commission) proposed the inclusion of the phrase "in community with the other members of the group." The final text of Article 27 of the ICCPR reads as follows:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Article 27 imposes specific obligations on the state parties, namely to protect minority rights. These obligations include direct duties of states to protect minority members against violations of their rights by private parties, to fulfill non-discrimination provisions, and to take positive action to protect a minority's identity and culture. [235] Article 27 aims to protect the identity of the group and to ensure the survival and continued development of the cultural, religious, and social identity of minorities.[236] Thus, Article 27 recognizes a "right to identity", even if it is not explicitly formulated. The elements of identity can be ethnic, religious, or linguistic, or all three. The aim is not the "museumification" of minority cultures, but to give those groups the possibility to develop their own ways of life within a

[234] UN Doc. E/CN.4/Sub.2/112.
[235] HRC General Comment No. 23, paragraph 9.
[236] See Ibid., paragraphs 6.2 and 9.

human rights framework and to contribute to the society as a whole. Forced assimilation, for example, would violate the right to identity.[237]

"In those States in which … minorities exist" almost invites states to declare that they do not have minorities on their territory.[238] Some states such as France and Turkey indeed stated that they do not have minorities on their territories and that therefore, Article 27 does not apply.[239] However, as mentioned above, the existence of a minority does not depend on the recognition of the minority by the state.[240]

The formulation "persons belonging to" shows that Article 27 provides for individual rights, not rights of minorities as a group. However, rights do not benefit every individual, only members of minorities. The 1979 Capotorti report states that "[it] is the individual as a member of a minority group, and not just any individual, who is destined to benefit from the protection granted by Article 27."[241] Some commentators see Article 27 as a "hybrid" between individual and group rights.[242] CAPOTORTI states against this background: "Article 27 does not refer to minority groups as the formal holders of the rights described in it, but rather stresses the need for a collective exercise of such rights. Therefore it seems justified to conclude that a correct construction of this norm must be based on the idea of its double effect-protection of the group and its individual members."[243] The same line of reasoning is confirmed by the jurisprudence of the HRC under the First Optional Protocol to the ICCPR and confirmed by the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (thereafter "UN Minority Declaration"), which again recognizes the rights of "persons belonging to minorities" while at the same time obliges states to protect the existence and identity of a minority as a whole (Article 1).[244]

Article 27 of the ICCPR situates the issue of minority rights within the wider context of human rights law. Nevertheless, minority rights and human rights are not identical notions.

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[237] PATRICK THORNBERRY. "Minority Rights." In *Collected Courses of the Academy of European Law*, ed. Marise Cremona, Bruno de Witte, and Francesco Francioni, 307-390. Oxford: Oxford University Press, 1995 Vol. VI-2. 332.

[238] Ibid., 333.

[239] See PENTASSUGLIA, Minorities in International Law, 98/99.

[240] HRC General Comment 23, paragraph 5.2.

[241] CAPOTORTI, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, paragraphs 206-210.

[242] See for example THORNBERRY, International Law and the Rights of Minorities, 12.

[243] FRANCESCO CAPOTORTI. "Are minorities entitled to collective international rights?" *Israel Yearbook on Human Rights* 20 (1990): 351-357. 353/354.

[244] See also PENTASSUGLIA, Minorities in International Law, 97-111.

Human rights law is designed to protect the rights of all individuals, whereas minority rights law is somewhat discriminatory as it only protects the rights of a certain, specified group that has to qualify for the status of a minority under international law. From a different perspective, minority rights represent some of the implications of the concept of substantive equality (equality in fact), as opposed to formal equality (equality in law).[245]

Apart for Article 27, the UNESCO Convention Against Discrimination in Education (1960) entitles members of national minorities to carry out their own educational activities, including the maintenance of schools and, depending on the educational policy of the state, the teaching of their own language (Article 5, paragraph 1, sub-paragraph c). Article 30 of the widely ratified UN Convention on the Rights of the Child (1989) combines the rights of indigenous and minority children with the rights provided by Article 27 of the ICCPR. The 1993 Vienna Declaration and Programme of Action reaffirmed the rights of persons belonging to ethnic linguistic or religious minorities to enjoy their own culture, to profess and practice their own religion and to use their own language in private and in public, freely and without interference or any form of discrimination.[246]

The most important contemporary, yet legally non-binding text regarding minorities within the UN context, is the 1992 UN Minority Declaration. It is based on Article 27 of the ICCPR but goes further in concretizing the rights and is not bound by the limitations of the ICCPR. The declaration stresses the continued importance of minority rights against the background of human rights within a democratic framework based on the rule of law. The most important changes are the use of positive language (instead of "shall not be denied the right" the declaration uses "have the right") and the inclusion of state duties (see, for example, Article 1, paragraph 1). The declaration can be viewed as a benchmark for a potential future convention on minority rights. However, a number of issues are not clarified by the UN Minority Declaration and require further discussion and analysis: (1) the extent to which minorities are entitled to constitutional or legislative recognition; (2) the extent to which it is permissible or desirable to identify members of minorities and the question of what should constitute the most important criteria for identification; (3) the range of

[245] See the PCIJ Advisory Opinion, *Minority Schools in Albania* (1935), PCIJ Series A/B, No. 64.
[246] Vienna Declaration and Programme of Action, paragraph 19.

structures developed in order to grant minorities effective political participation and autonomy on the local, regional, and national level; (4) the choice between the provision of separate institutions for members of minorities and the integration of different groups in a multicultural society; (5) the impact of national development plans on minority communities; (6) the relationship between rights of minorities and indigenous peoples; and (7) the implication of the application of minority rights on conflict prevention and conflict resolution.[247]

The incorporation of minority rights into a human rights framework under the UN regime also had significant consequences on the institutional side. The UN realized in the late 1940s that it could not remain indifferent to the destiny of minorities. The mandate of the Commission of Human Rights (CHR, since March 2006 the Human Rights Council[248]) includes the submission of proposals, recommendations, and reports on the protection of minorities to the Economic and Social Council (ECOSOC).[249] Resolution 9 (II) 1946 established the Sub-Commission on Prevention of Discrimination and Protection of Minorities (renamed to "Sub-Commission on the Promotion and Protection of Human Rights" in 1999), a committee of experts with the mandate "to undertake studies … and to make recommendations to the Commission concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities."[250] The Sub-Commission was established to find ways in which states and the international community can solve the dual task of preventing discrimination and protecting minorities and their identity in a manner that is compatible with general human rights.

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[247] HADDEN, International and National Action, paragraph 18.

[248] See UN Doc. A/Res/60/251 (2006). The Commission on Human Rights will be formally abolished on 16 June 2006. The Human Rights Council, based in Geneva, will consist of 47 members. It will address violations of human rights, including gross and systematic violations, and promote effective coordination and the mainstreaming of human rights within the United Nations system. The text of the resolution reaffirms the Assembly's commitment to strengthen the United Nations human rights machinery, with the aim of ensuring the effective enjoyment by all of human rights – civil, political, economic, social and cultural rights, including the right to development. It also emphasizes the responsibilities of all States, in conformity with the Charter, to respect human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language or religion, political or other opinion, national or social origin, property, birth or other status. The mandate does not contain a provision for dealing with ethnic minority issues.

[249] ECOSOC Resolution 5 (I) of 16 February 1946.

[250] ECOSOC Resolution 9 (II) of 21 June 1946.

The Sub-Commission played an important role in trying to define the term "minority" and in preparing the draft text for Article 27 of the ICCPR. Furthermore, the sub-commission was engaged under the so-called "ECOSOC 1503 procedure" that allows the confidential consideration of complaints concerning alleged human rights violations that show a consistent pattern of systematic or gross violations.[251] The assessment of country-specific minority problems, for example the discriminatory practices under the apartheid regime in South Africa, or of thematic issues[252] in combination with the appointment of rapporteurs to study minority issues, made the sub-commission an effective tool in dealing with minority issues. Most prominently, the commission appointed FRANCESO CAPOTORTI to undertake a study[253] on the rights of persons belonging to minorities and the application of Article 27 of the ICCPR (concluded in 1978) and ASBJØRN EIDE with the task of carrying out a study[254] on possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities (concluded in 1993). ASBJØRN EIDE highlighted the need for arrangements for minorities based on international human rights standards within a broad conflict prevention strategy, which led to the establishment of the UN Working Group on Minorities (WGM), another expert committee.

The WGM was established in 1995 and is the only UN body addressing minority issues directly. The WGM plays an important role in fostering dialogue between minorities and governments and has provided a detailed and useful interpretation, clarification, and development of standards of minority protection by providing a commentary to the 1992

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[251] ECOSOC Resolution 1503 (XLVIII) of 27 May 1970.

[252] The Sub-Commission is currently studying a wide range of issues. These are studies by special rapporteurs on the rights of non-citizens; the concept and practice of affirmative action; globalization and its impact on the full enjoyment of human rights; the elimination of traditional practices affecting the health of women and girls; indigenous peoples and their relationship to land; and terrorism and human rights; as well as the preparation of working papers on discrimination based on work and descent; measures provided in the various international human rights instruments for the promotion and consolidation of democracy; the consequences of the working methods and activities of transnational corporations as well as the responsibility of states and transnational corporations with regard to violations of all human rights; procedures for the implementation of standards on the human rights conduct of companies; the administration of justice through military tribunals and exceptional jurisdiction; domestic implementation in practice to provide effective remedies; discrimination in the criminal justice system; and the privatization of prisons. In addition, the Sub-Commission requested the Commission in 2000 to approve four new studies. These are: the human rights problems and protections of the Roma; the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water; human rights and human responsibilities; and reservations to human rights treaties. See also Fact Sheet on the Special Procedures of the Commission on Human Rights. http://www.unhchr.ch/pdf/factsheet27.pdf.

[253] CAPOTORTI, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities.

[254] EIDE, Possible ways and means.

UN Minority Declaration.[255] Regional workshops and an emerging praxis of country visits upon invitation are more recent additions to the activities of the Working Group.[256] However, the Working Group is not a monitoring body as its mandate does not permit it to assess crisis situations or to give recommendations. Furthermore, with only five days of meetings per year and two permanent staff members, the Working Group is severely under-resourced and does not present the ideal forum for more than discussion.[257] It is not equipped to act as an early-warning mechanism or to perform conflict prevention or resolution activities. It is not able to visit high-risk countries and monitor special situations. The Report of the High Commissioner on Human Rights on minorities stresses "the need for the adoption of new solutions, [with] particular emphasis … on establishing an international protection mechanism to deal with minority issues that could undertake fact-finding missions and accept and handle complaints about violations of the rights of persons belonging to minorities."[258]

The Office of the UN High Commissioner for Human Rights (OHCHR), a department of the UN Secretariat, also deals with minority questions. The mandate does not directly speak about minority issues, but minority protection is included in the broader context of the promotion and protection of human rights. The mandate includes preventing human rights violations, securing respect for all human rights, promoting international cooperation to protect human rights, coordinating related activities throughout the UN, and strengthening and streamlining the UN system in the field of human rights. In addition to its mandated responsibilities, the Office leads efforts to integrate a human rights approach within all work carried out by UN agencies. The office also has the ability to undertake preventive human rights action and field missions in countries with human rights violations.[259] As we will see in

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[255] See the Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2001/2.

[256] HADDEN, International and National Action, paragraph 49.

[257] Ibid., paragraph 14.

[258] Report of the High Commissioner for Human Rights, Specific Groups and Individuals: Minorities, UN Doc. E/CN.4/2004/75, paragraph 26.

[259] See http://www.ohchr.org/english/about/. Besides preventive action and field work, the functions of the OHCHR include the promotion of the universal enjoyment of all human rights by giving practical effect to the will and resolve of the world community as expressed by the UN; playing the leading role on human rights issues and emphasizes the importance of human rights at the international and national levels; the promotion of international cooperation for human rights; coordination of human rights action within the UN; promotion of ratification of human rights treaties and national infrastructure; and education, information, and technical assistance in the field of human rights.

Chapter 4 of this study, the enhancement of the OHCHR's preventive actions and field missions would contribute substantially to ethnic conflict resolution and improve the UN approach to addressing minority issues.

The UN human rights treaty-monitoring system offers the most systematic and objective approach to the implementation of minority-related standards. These expert committees monitor the implementation of the human rights provisions contained in the treaty.[260] The Human Rights Committee (HRC) and the Committee on the Elimination of all Racial Discrimination (CERD) proved to be most constructive in developing interpretation, jurisprudence, and general comments/recommendations of provision related to minority protection. Moreover, the CERD has stretched its supervisory role to include early warning procedures and urgent reaction mechanisms. Through its decisions and engagement of the Secretary General on behalf of the CERD and HRC, issues involving ethnic groups and minorities gained the UNSC's attention, especially regarding systematic gross violations of human rights. States are obligated to periodically submit reports about the measures they have taken to ensure the enjoyment of the rights provided by the treaties. Both the HRC and CERD have established individual complaint procedures, in which individuals can claim to be victims of a violation of their rights.[261] However, the treaty bodies have some substantial weaknesses. First, they only consider state reports every few years. Second, the state party concerned decides what to include in the report. Third, their mandate does not include fact-finding capabilities.[262] And finally, most of the measures adopted are not legally binding and have the form of recommendations. Dialogue, mediation, reconciliation, expert advice,

[260] Currently, there are 6 treaty monitoring bodies: The Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR); the Committee on Economic, Social and Cultural Rights, which monitors the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Committee against Torture, which monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Committee on the Elimination of Racial Discrimination, which monitors the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); the Committee on the Elimination of Discrimination against Women, which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Committee on the Rights of the Child which monitors the implementation of the Convention on the Rights of the Child (CRC).

[261] In the case of the HRC, the individual claims procedure is part of the First Optional Protocol to the ICCPR. The CERD can consider individual communications under Article 14 of the ICERD.

[262] HELENA NYGREN KRUG. "Genocide in Rwanda: Lessons Learned and Future Challenges to the UN Human Rights System." *Nordic Journal of International Law* 67 (1998): 165-213. 185.

confidence-building measures, and international conflict resolution contribute to the implementation of these recommendations

Even though the scope of this study does not include the analysis of regional organizations and efforts dealing with minority issues and ethnic conflicts, it is important to give a quick overview of achievements on the European level as they have played an important role in developing the modern minority protection framework within UN system and influence discussions about reform of UN institutions. The Council of Europe (COE) and the Organization for Security and Cooperation in Europe (OSCE, former CSCE) have both been active in protecting and promoting minority rights. Similar to the UN Charter and the UDHR, the COE 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) does not contain any specific minority provisions. It only provides for the enjoyment of the rights under the ECHR without discrimination on any ground, including "national or social origin, association with a national minority" (Article 14). The prohibition of discrimination has been expanded under Protocol No. 12. The European Charter for Regional and Minority Languages (1992) affects the specific position of linguistic minorities. The most important document in the COE context and the first multilateral treaty on the protection of minorities is the Framework Convention for the Protection of National Minorities (1995) (thereafter "Framework Convention"). The Framework Convention confirms the inseparable relationship between minority rights and human rights, stating that "[t]he protection of national minorities and of the rights and freedoms of persons belonging to those minorities form an integral part of the international protection of human rights" (Article 1).

In the context of the CSCE/OSCE, the minority issue was recognized in very limited manner as part of Principle VII of the CSCE 1975 Helsinki Final Act, which was basically concerned with equality before the law, actual enjoyment of human rights, and protection of legitimate interests in this sphere. The document of the Copenhagen Meeting on the Human Dimension of 1990 (thereafter "Copenhagen document") however, provides for a wide range of minority provisions and remains the most important and inclusive OSCE document. The OSCE High Commissioner on National Minorities (HCNM) is the major

institution dealing with minority issues and plays an important role in preventing ethnic conflict and fostering dialogue between ethnic groups and governments.[263]

The EU also has some protection mechanisms for minorities in its human rights section. The Treaty Establishing the European Community (EC Treaty) contains references to respect of cultural diversity (Article 151, ex Article 128) and an anti-discrimination clause covering issues regarding minorities (Article 13, ex Article 6a). The Charter of Fundamental Rights of the EU contains equality and non-discrimination provisions in Article 20 and Article 21, paragraph 1 as well as references to respect for cultural diversity (Article 22).

In sum, minority protection in international law has two pillars: the prohibition of discrimination on the one hand, and special measures designed to promote and preserve the special identity of minorities on the other.[264] The goal of minority rights is to establish equality not only in law, but also in fact. The state should be the common home for all parts of its resident population under the condition of equality, with opportunity for the preservation of different identities, cultures, and traditions for ethnic groups living within the country. Priority in minority protection should be given to members of groups which are truly vulnerable and subject to discrimination, marginalization, and/or human rights abuses by the majority.[265]

Minority rights need to be brought into balance with human rights, or more correctly, to be seen as part of human rights. Whatever respect must be paid to the rights of groups, the stance of modern international law is clear in according the primacy to individual choice; respect for group rights does not justify "group determinism" or the overriding of individual choice by claims of the group.[266] The basis for the consideration of minority rights is the UN Charter, which states in its Preamble, Article 1, paragraph 3, and Article 55 that a general

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[263] See on the role and influence of the HCNM on international law and ethnic conflict resolution RATNER, Does International Law Matter.

[264] This double track approach was confirmed by the PCIJ Advisory Opinion in the *Minority Schools in Albania* case and reflected in the documents of the UN Sub-Commission. See also KRISTIN HENRARD. *Devising an Adequate System of Minority Protection. Individual Human Rights, Minority Rights and the Right to Self-Determination.* The Hague: Kluwer Law International, 2000. 8; and ANNELIES VERSTICHEL. "Recent Developments in the UN Human Rights Committee's Approach to Minorities, with a Focus on Effective Participation." *International Journal on Minority and Group Rights* 12 (2005): 25-41. 28.

[265] EIDE, Possible ways and means, paragraph 1 an 89.

[266] THORNBERRY, International Law and the Rights of Minorities, 394.

objective of the organization is "the universal respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[267]

Human rights and minority rights are inseparably connected and, in the words of Patrick Thornberry, "rights of minorities are a particular barometer of human rights in general."[268] Any attempts to use an international legal approach to ethnic conflict resolution using minority rights have to acknowledge this repationship in order to be valid and effective.

2.3 Conclusion

International law has developed a number of norms, instruments, and institutions to deal with ethnic conflict and minority issues. When focusing on the development within the UN, these rules and procedures have to be viewed in a broader context of international human rights law. The right to self-determination for peoples developed in the context of decolonization and thus included the notion of independence. In recent years, the concept of internal self-determination gained importance, linking self-determination to democratic participation and inclusive governance.

The importance of minority protection has only been realized in the last few decades. Early UN human rights documents do not refer to minority rights on the assumption that individualistic notions of equality and non-discrimination would be enough to protect rights of ethnic groups. Only when drafting and adopting the ICCPR did the international community realize that a prescription providing merely that states should not discriminate was insufficient. After the adoption of the ICCPR, whose Article 27 still provides the basis for dealing with minorities in international law, more instruments and institutions were developed to handle minority issues, culminating in the 1992 UN Minority Declaration and the establishment of the Working Group on Minorities.

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[267] See also JOHN PACKER. "On the Content of Minority Rights." In *Do We Need Minority Rights? Conceptual Issues*, ed. Juha Räikkä, 121-178. The Hague, Kluwer Law International, 1996. 122.

[268] See PATRICK THORNBERRY. "The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism." In *Modern law of Self-Determination*, ed. Christian Tomuschat, 101-137. Dordrecht: Martinus Nijhoff, 1993. 136.

In a recent study about "Minority Rights and Ethnic Conflict Prevention", the Working Group identified the human rights of ethnic groups. These include the right:[269]

- to maintain and enjoy their culture, religion, and language free from discrimination;
- to equality and non-discrimination in all areas and levels of education and employment;
- access to health care, housing, and social services;
- to use their personal names in their own language according to their own language;
- to use their language in communications with and to obtain services from administrative authorities in regions and localities where they are present in significant numbers;
- in areas inhabited by minorities in substantial numbers, if there is sufficient demand, to public instruction in, or teaching of, a minority language, as appropriate;
- to establish and maintain their own private schools and other training and educational institutions, and to teach and receive training in their own languages;
- to freedom of religion, freedom of expression, and freedom of association;
- to participate effectively in cultural, religious, social, economic and public life;
- to enjoy and develop their own culture and language;
- and to participate in shaping decisions and policies concerning their group and community, at the local, national and international levels.

The recognition of ethnic differences can have good and bad effects. On one hand, recognizing and underlining the differences can lead to discrimination, exclusion, and in the worst case, even to extermination of the ethnic group. The Holocaust, the genocides in Rwanda and Darfour, the South African apartheid system, and the ethnic cleansing in the Balkan conflicts are only among the cruelest examples on how emphasizing differences can be exploited. On the other hand, the recognition of difference can be the first step to addressing these distinctions – it is the first step to minority rights, effective participation of

[269] See FERNAND DE VARENNES. "Minority Rights and the Prevention of Ethnic Conflicts." UN Doc. E/CN.4/Sub.2/AC.5/2000/CRP.3.

ethnic minority groups, autonomy and federal arrangements, and other forms of peaceful coexistence and cooperation between ethnic groups.

Rights of ethnic groups address diverse issues ranging from the preservation of a minority's culture to non-discrimination in housing. The complex nature of ethnicity and ethnic conflict as described above is reflected in the efforts dealing with minorities and peoples in international law. Bringing light to this darkness is extremely difficult and complex.

3. Dealing with Claims of Ethnic Groups in International Law

Claims of ethnic groups can fall in two major categories: demands for protection and demands for empowerment. The first category concerns demands for protection against extinction and discrimination, as well as claims focusing on the preservation of culture and ethnic identity of the group. Claims falling within the second category concern to empowering the group to: have the authority to determine their own affairs, actively and effectively participate in the state, obtain autonomy (non-territorial (cultural) and territorial), and in some cases, be able to secede from the state and gain independence. The claims depend on the structure of the ethnic group and its role in the society.[270] Regionally concentrated groups with a history or myth of independent political existence tend to seek secession or autonomy, while minorities integrated in pluralistic societies request for equal treatment and access to power within existing political structures.[271]

Each of these claims has its own structure and legitimacy, and thus a different response in international law. Most group claims involve different elements of both categories. However, the formulation of the claim and the legal domain it addresses affects its political and legal nature, its justification, and the form of legal response. For instance, a claim to a particular piece of land by an ethnic group can be a claim to reestablish historical sovereignty; a claim to special measures securing the use of the land and its resources for the ethnic group (especially if it is indigenous); a means of obtaining a certain degree of self-determination, ranging from power sharing and autonomy to secession and independence; a claim to protect the group's minority rights and cultural identity; a claim to participate in public affairs on the regional level; a "simple" equality claim; and so on.

One of the major demands of politically organized groups is the formal recognition of the group as such. In most states with two or more major ethnic communities there is a general trend to include some reference of this fact in the national constitution.[272] This form

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[270] See CHRISTIAN P. SCHERRER. *Ethnicity, Nationalism and Violence: Conflict Management, Human Rights, and Multilateral Regimes*. Aldershot: Ashgate, 2003. 113.

[271] See VAN EVERA, Hypotheses on Nationalism and War, 31.

[272] See for a summary of examples the appendix of TOM HADDEN and CIARAN O MAOLAIN. "Integrative Approaches to the Accomodation of Minorities." UN Doc. E/CN.4/Sub.2/AC.5/2001/CRP.9.

of recognition provides a basis for most measures of protection of ethnic groups, the promotion of their identity, and their participation in the structures of the government. However, in societies in which minorities are less established, less numerous, or not politically mobilized, explicit constitutional recognition may become less practicable. An often practiced alternative approach is the inclusion of a general reference to the multi-ethnic character of the population. This might provide a basis for more detailed legislative protection and recognition, such as the prohibition of discrimination on ethnic grounds as well as the promotion of fair participation and proportional representation on the state level.[273]

3.1 Protection

As discussed in preceding chapters, the major reasons to protect ethnic groups are the maintenance of peace and security, human dignity, and the preservation of the group's identity. Within this protection framework, ethnic groups have different claims, ranging from the defense against genocide to non-discrimination and the protection of the group's culture. The current chapter addresses each of these issues and looks at the response of international law.

3.1.1 Existence

The claim of ethnic groups to physical existence is the most fundamental claim. In turn, the right to life and the right to existence are the most basic human rights. Thus, among the corpus of international standards that are relevant to the protection of minorities is the right to be protected against genocide. Genocide targets minorities with the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group."[274] Genocide does not happen without warning, but is usually planned, organized, and systematically executed.

[273] HADDEN, International and National, paragraph 20.
[274] Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention"), Article 2.

GREGORY STANTON distinguishes eight stages of genocide:[275]

- *Classification*. Classification is the distinction between "us and them" by ethnicity, race, religion, nationality, and other factors. Societies with clearly distinguishable categories of peoples that lack mixed groups are most prone to genocide.
- *Symbolization*. Symbolization includes giving names and other symbols to groups of peoples, such as "Muslim" or "Gipsy". Both classification and symbolization are part of human nature and do not necessarily result in genocide. However, when combined with hatred, symbols may be forced on groups (such as the yellow star on Jews under the Nazi regime).
- *Dehumanization*. The stage of dehumanization is reached when one group denies the humanity of the other group. Dehumanization overcomes the natural human revulsion against murder. Hate speech is common in this stage.
- *Organization*. Genocide is always organized, usually by the state or with support of the state. Special army units are trained and armed in this stage and plans are made for the killings.
- *Polarization*. Extremists drive groups apart, and extremist terrorism targets moderates in their own group, intimidating and silencing the center.
- *Preparation*. Victims are identified and marked because of their ethnic identity. They are forced to live in ghettoes, camps, or expulsed in a region and starved.
- *Extermination*. The killings begin and go on until either the group is "exterminated" or until outside action stops the genocide.
- *Denial*. The perpetrators dig up the mass graves, burn the bodies and destroy other evidence of the genocide. They deny that they committed any crimes and block investigations.

In international law, the term "genocide" was first defined in the context of the Holocaust. The jurist LEMKIN described genocide in 1944 as:

> a co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture,

[275] See GREGORY H. STANTON. "Eight Stages of Genocide." http://www.genocidewatch.org/.

> language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against individuals, not in their individual capacity, but as members of the national group.[276]

LEMKIN identified different forms of genocide. "Political" genocide implies the complete destruction of a government and replacement by an ethnically homogenous, despotic regime. "Social" genocide involves the weakening of the spiritual resources of the state, especially attacks on critical intelligentsia. "Cultural" genocide includes prohibiting the use of minority languages, education in the majority culture and language, and the control of culture in general, including manifestations of this policy such as book burnings. "Economic" genocide means the destruction of the minority's economic resources, including expropriation of land and the prohibition of traditional economic activities. "Biological" genocide involves measures to favor lower birthrates in ethnic minorities, such as the forcible separation and/or starvation of men and women and measures designed to affect the survival capacity of children. "Physical" genocide refers to what is commonly referred to as genocide, namely mass killings. "Religious" genocide is the elimination and prohibition of a minority's religion. Finally, "moral" genocide represents an attempt to debase a group by, for example, encouraging the consumption of alcohol.[277]

Genocide entered international criminal law after the Second World War as part of "crimes against humanity" in Article 6, paragraph c of the Charter of the International Military Tribunal for Germany,[278] namely "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war or persecutions on political, racial, or religious grounds."

Under the auspices of the UN, genocide emerged later as a separate legal concept. UNGA Resolution 96/I (1946), which was adopted unanimously and without debate, defined genocide as "a denial of the right to existence of entire human groups", existence referring to physical existence of racial, religious, political, and other groups. The resolution

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[276] RAPHAEL LEMKIN. *Axis Rule in Occupied Europe*. Washington: Carnegie Endowment for International Peace, 1944. 79.

[277] Ibid. Chapter IX, Part II: Techniques of Genocide in Various Fields. See also THORNBERRY, International Law and the Rights of Minorities, 61/62.

[278] Signed in August 1945 by the U.S., UK, France, and the Soviet Union, and later by nineteen other states.

adopted genocide as "a crime under international law which the civilized world condemns" and refers to the punishability of the crime. For the first time, genocide was treated independently from other war crimes. The resolution influenced the 1948 Genocide Convention.

The Genocide Convention defined genocide as a crime under international law (Article 1). Any regime that commits genocide forfeits its legitimacy and can become subject to international intervention. Genocide is defined as (Article 2):

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

Genocide Watch, an international NGO concerned with prevention and punishment of mass murder, specifies these crimes. Killing members of the group includes direct killing and actions causing death; causing serious bodily or mental harm includes inflicting trauma on members of the group through torturing, rape, sexual violence, forced use of drugs, and mutilation; deliberately inflicting conditions of life calculated to destroy a group includes the deprivation of resources needed for the groups physical survival, namely clean water, food, clothing, shelter, and medical services; deprivation can be imposed through confiscation of harvests, blockade of food transports, detention in camps, forcible relocation or expulsion into deserts or similar uninhabitable territories; prevention of births includes involuntary sterilization, forced abortion, prohibition of marriage, and long-term separation of men and women intended to prevent procreation; and forcible transfer of children may be imposed by direct fore or through threats such as violence, detention, and psychological oppression.[279]

It is not surprising that all acts under Article 2 refer to either "physical genocide" (a-c) or "biological genocide" (d), or both (e). The question of "cultural genocide" was excluded as the concept was too vague and open to abuse. As a result, the term "genocide" was

[279] See "What is Genocide?" Genocide Watch, http://www.genocidewatch.org/.

narrowed down to acts targeting the physical integrity of the group and lost the open meaning suggested by LEMKIN.

Besides the prohibition to intentionally destroy a group (Article 2) and obligations for parties to prevent, punish and prosecute the crime of genocide including the principle of individual criminal responsibility (Article 4), the Genocide Convention includes a provision stating that the states themselves can be held responsible (Article 9). This was confirmed by the ICJ in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Preliminary Objections),[280] in which the ICJ observed that state responsibility does not only apply if a state fails to prevent genocide, but also to acts of genocide directly committed by the state (paragraph 32). The ICJ has also noted that the rights and obligations enshrined by the Genocide Convention are rights and obligations *erga omnes*, which means that a party's duty to combat genocide is not limited to the party's territory (paragraph 31).[281]

The prohibition of genocide is not only a general international legal norm but also a norm of *jus cogens* under Article 53 and 64 of the Vienna Convention on the Law of Treaties, which means that "no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[282] Under the UN International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, genocide can entail the international state responsibility which is attached to serious breaches of *jus cogens* norms.[283]

Other documents and institutions protect the right to existence of ethnic groups. Protection for the physical existence of minorities derives from the jurisdiction of the UN international tribunals (the International Criminal Tribunal for the Former Yugoslavia

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[280] ICJ Preliminary Objections in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Yugoslavia)* (1996), ICJ Reports 1996.

[281] The ICJ distinguishes between "the obligations of a State towards the international community as a whole and those arising vis-à-vis another State." Obligations with *erga omnes* character are the concern of all states and all states can be held to have a legal interest in their protection. See ICJ Second Phase in the case concerning *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* ICJ Reports 1970, paragraph 33.

[282] Vienna Convention on the Law of Treaties, Article 53.

[283] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd session in 2001, UN Doc. A/CN.4/L.602/Rev. 1, Articles 40 and 41.

(ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC)). All three tribunals prosecute persons for serious violations under international law, namely the crime of genocide, crimes against humanity, and war crimes ("grave breaches of the Geneva Conventions of 1949").[284] "Ethnic cleansing", which "entails deportation and forcible mass removal or expulsion of persons from their homes in flagrant violation of their human rights, and which is aimed at the dislocation or destruction of national, ethnic, racial or religious groups,"[285] is essentially covered by the Statute of the ICC, together with other practices seriously affecting the physical integrity of a minority group and its members.[286]

In a more general way, the right to existence is addressed in human rights documents, e.g. Article 20 of the ICCPR or Article 4 of the ICERD, concerning the prohibition of propaganda for war and incitement to discrimination, hostility or violence based on advocacy of national, racial or religious hatred. The 1992 Minority Declaration provides in Article 1 that states "shall protect the existence" of national or ethnic, cultural, religious and linguistic minorities. This refers to a basic right to be protected against genocide.[287] The prohibition of "cultural genocide", which is understood as the destruction of a group's specific traits, includes the ban of discrimination on ethnic, racial, national, linguistic, or religious ground, of forced assimilation, ethnocide, and specific measures regarding property rights and participation in political bodies. These are only some examples that illustrate the internationally recognized preconditions for the preservation of a minority's special traits, tradition, and culture.

Protection of the existence also includes the continued residence in the area where the ethnic group lives and the right to freely move somewhere else. Expulsions and displacement on the basis of ethnic identity are human rights violations and are part of the strategy of ethnic cleansing which is prohibited by the ICC Statute.[288]

Genocide is the worst atrocity committed against an ethnic group and violates minorities' most fundamental rights. The crime of genocide includes two elements: intention

[284] Articles 2-5 of the ICTY Statute, Articles 2-4 of the ICTR Statute, and Article 5 of the ICC Statute.
[285] UN Commission on Human Rights Resolution 1992/S/-1/1, paragraph 5.
[286] See ICC Statute, Article 7.
[287] THORNBERRY, International Law and the Rights of Minorities, 44.
[288] ICC Statute, Article 7.

and action designed to physically destroy an ethnic group. Despite the fact that the Genocide Convention is one of the strongest international instruments in terms of language, precision, and consequences for implementation, the UN has failed to act more than once. The genocides in Rwanda, in the Balkans, and most recently in Darfour remind us that ethnic conflict is more than just a threat to international peace and security. The Report of the International Commission on Intervention and State Sovereignty, named "Responsibility to Protect" states: "What is at stake here is not making the world safer for big powers, or trampling over the sovereign rights of small ones, but delivering practical protection for ordinary people, at risk of their lives, because their states are unwilling or unable to protect them."[289]

3.1.2 Equality and Non-Discrimination

Discrimination is among the most common offences against members of minorities. Claims to not be discriminated against and to have equal rights and opportunities are among the most frequently uttered demands of ethnic groups. Comprehensive equality and non-discrimination provisions contribute to the prevention of ethnic disputes. Violations of equality and non-discrimination rights of minority groups are important underlying causes of ethnic conflict.

The right to equality and non-discrimination are well-established principles of international human rights law.[290] Equality and non-discrimination constitute interdependent and mutually reinforcing concepts that are composed of two elements: (1) abstention from any kind of differentiation based on arbitrary or unreasonable grounds, and (2) differential treatment ("positive" discrimination) with the intention to achieve equality in situations of inequality and discrimination.[291]

Equality and non-discrimination provisions are part of the UN Charter (Article 1, paragraph 3 and Article 55, sub-paragraph c), the UDHR (Article 2) and also the

[289] Report of the International Commission on Intervention and State Sovereignty. *The Responsibility to Protect.* Ottawa: International Development Research Centre, 2001. Paragraph 2.1.

[290] See for a summary of the history of equality and non-discrimination clauses in international PENTASSUGLIA, Minorities in International Law, 84/85.

[291] Ibid., 89.

International Covenants contain general and specific clauses. Furthermore, there are other specialized and regional instruments that deal with discrimination.[292] Non-discrimination and the right to equality are widely acknowledged as customary international law.[293]

Regarding the definition of discrimination, the HRC stated in its General Comment No. 18 on non-discrimination under the ICCPR:

> the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[294]

Article 2, paragraph 1 of the ICCPR obliges all state parties "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Whenever "race" is used, it also includes "ethnic group".[295]

The non-discrimination clauses in the ICCPR[296] not only prohibit discrimination, but oblige states "to ensure" that individuals are protected against discrimination by private actors.[297] The CERD General Recommendation 23 on the rights of indigenous peoples, adopted in 1997,[298] and the 2001 Declaration and Programme of Action adopted by the UN World Conference against Racism, Racial Discrimination, Xenophobia and Related

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[292] For example the ICERD (1965), the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981), the UN Convention on the Rights of the Child (1989), ILO Convention No. 11 concerning Discrimination I Respect of Employment and Occupation (1958), UNESCO Declaration on Race and Racial Prejudice (1978), the UNESCO Convention against Discrimination in Education, and the Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). On the regional level, the ECHR (Article 14) and Protocol No. 12 to the ECHR include prohibition of discrimination.

[293] See for a detailed argument PENTASSUGLIA, Minorities in International Law, 85.

[294] HRC General Comment No. 18: Non-Discrimination, UN Doc. HRI\GEN\1\Rev.1 (1989),. paragraph 7.

[295] EIDE, Possible ways and means, paragraph 131.

[296] Article 2, paragraph 1, Article 3, and Article 26 ICCPR.

[297] See HRC General Comment No. 18, paragraph 9. The same is laid down in Article 2, paragraph 1, sub-paragraph d of the ICCPR.

[298] CERD General Recommendation No. 23: Rights of indigenous peoples, UN Doc. A/52/18, annex V at 122 (1997).

Intolerance[299] emphasize the importance of equality and non-discrimination for minority groups. Minorities are not the only beneficiaries of anti-discrimination and equality norms. However, the fact that most provisions include references to race, national or ethnic origin, religion, language, social status, and birth, shows the international awareness of discrimination against minorities.

The goal of anti-discrimination clauses is to place members of minorities on a footing of equality with the other nationals of the state, to prevent any action which denies to individuals or groups of people equality, and to suppress or prevent any conduct which denies or restricts a person's right to equality.[300] The protection of one minority, however, can lead to the discrimination of other minorities. In *Waldman v. Canada*, the HRC concluded that the public funding of schools of the Roman Catholic minority in Canada, but of no schools of any other minority religion, constitutes a violation of Article 26 of the ICCPR.[301] A breach of Article was also found in *Diergaardt et al. v. Namibia*, in which case the HRC stated that the authors, speakers of the minority language, were victims of intentional discrimination on linguistic grounds.[302]

However, not every differentiation of treatment constitutes discrimination if the criteria for such differentiation are reasonable and objective, and if the aim is to achieve a purpose which is legitimate under the ICCPR.[303] Article 1, paragraph 4 of the ICERD states:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for

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[299] See for example paragraphs 39, 59, 60, 66, and 67 of the Declaration and Programme of Action, World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance 2001, UN Doc. A/CONF.189/12 (2001).

[300] GUDMUNDUR ALFREDSSON. "Report on Equality and Non-discrimination: Minority Rights." COE H/Coll 90/6 (1990): 1-23. 5.

[301] *Arieh Hollis Waldman (Initially represented by Mr. Raj Anand from Scott & Aylen, a law firm in Toronto, Ontario) v. Canada*, HRC Communication No. 694/1996, UN Doc. CCPR/C/67/D/694/1996 (1999).

[302] "The authors have also claimed that the lack of language legislation in Namibia has had as a consequence that they have been denied the use of their mother tongue in administration, justice, education and public life. … In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 of the Covenant." *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia*, HRC Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997 (2000).

[303] HRC General Comment No. 18, paragraph 13.

> different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

This principle can also be found in international texts concerning minorities, e.g. in Article 4, paragraph 1 of the UN Minority Declaration. Positive discrimination, in the last years more commonly known as affirmative action, is "preference for certain groups or members of those groups, typically defined by race, ethnic identity or sex, for the purpose of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms."[304]

There are "soft" and "strong" versions of affirmative action.[305] The "soft" versions are basically extensions of the principle of non-discrimination. Stronger affirmative action measures are aimed at the accelerated creation of a balanced and equal society, namely equality in participation on all levels, in political life, education, economy, and many other fields. Typical means of accomplishing this are the establishment of quotas for access to higher education, civil service, employment etc. Such measures suspend or modify the traditional criteria of merit as a basis for access, but can be justified if past discriminatory practices blocked members of those groups from gaining the merits needed.[306]

Another method to achieve equality is the implementation of economic, social, and cultural rights on the basis of need, not taking into account ethnic, racial or gender background. This would not qualify as affirmative action, as it is simply the realization of social and economic rights. Furthermore, the redistribution of resources such as land and capital can provide possibilities for equality of opportunity. This can take many forms, including direct and indirect taxation, free or state-sponsored education, grants etc.[307]

An important distinction has to be made between the anti-discrimination/equality clauses and rights for minorities. The Sub-Commission defined the difference as follows:

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[304] EIDE, Possible ways and means, paragraph 172.
[305] Ibid., paragraph 178/179.
[306] See RUTH BADER GINSBURG and DEBORAH JONES MERRITT. "Affirmative Action: An International Human Rights Dialogue." *Cardozo Law Review* 21 (1999-2000): 253-282; MARJORIE COHN. "Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violations of its International Obligations." *Virgina Journal of International Law* 43 (2002/2003): 249-274; CELINA ROMANY and JOON-BEOM CHU. "Affirmative Action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions." *Connecticut Law Review* 36 (2003/2004): 36-76.
[307] EIDE, Possible ways and means, paragraphs 185-193.

1. Prevention of discrimination is the prevention of any action, which denies to individuals or groups of people equality of treatment, which they may wish.
2. Protection of minorities, is the protection of non-dominant groups which, while wishing in general for equality of treatment with the majority, wish for a measure of differential treatment in order to preserve basic characteristics which they possess and which distinguish them from the majority of the population.[308]

Anti-discrimination clauses prohibit a certain treatment, but do not embrace minority rights. The basic aim of the prevention of discrimination is to secure full and equal enjoyment of human rights and fundamental freedoms (Article 1, paragraph 4 of the ICERD) and to eliminate "barriers between races" (Article 2, paragraph 1, sub-paragraph e of the ICERD). Minority rights are a wider notion as they specifically aim at preserving the characteristics which distinguish the minority from the majority.[309] Article 2 and 26 of the ICCPR are available to everyone who feels discriminated against, including persons belonging to minorities, women, political groups and others. By contrast, Article 27 provides guarantees that are only available to persons belonging to national or ethnic, religious or linguistic minorities.

Most states have adopted a legislation covering many of the anti-discriminatory provisions of the ICCPR, ICESCR, and the ICERD. Effective implementation of these provisions is one of the first steps preventing ethnic violence from occurring. The ICERD has one of the highest numbers of ratifications,[310] which underlines the importance and the level of agreement on the matter of equality and non-discrimination. Equality provisions in national legislations include the right of individuals to be treated equally before the law, enjoyment of civil and political rights, the right to property, the right to personal security, freedom from discrimination in employment or housing, discrimination in education, access to public service, the prohibition of associations that promote racial discrimination, and the prohibition of incitement speech.[311] A number of policies have been taken to counteract ethnic discrimination. States established institutions monitoring racial equality, human rights commissions, an Ombudsman, minority councils etc.

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[308] Report of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/52 (1947), Section V.
[309] See for example the PCIJ *Minority Schools in Albania* case, 17.
[310] As of 2004, 169 states have ratified the ICERD.
[311] See for a detailed analysis EIDE, Possible ways and means, paragraphs 136-152.

The effectiveness of legislation prohibiting discriminatory practices depends on several factors, the most important ones being the general acceptance of the practice by the public, the consistent and impartial implementation by the courts, and its unbiased enforcement by police and security forces.[312] The problem is that these provisions are not very effective in time of ethnic conflict. Police and security forces are usually representing the majority. In the worst case, there can be attacks on minorities by death squads, the use of torture when imprisoned, and random imprisonment on the basis of ethnicity. International monitoring bodies have to make sure that basic human rights of minorities are respected.

3.1.3 Identity and Culture

The core of minority protection lies in special, permanent measures to protect the identity of the group.[313] The focus is on what makes these groups different from the rest of the population, while clearly rejecting any discriminatory regimes such as the policy of apartheid. It is now generally accepted that every culture has dignity and value and as a consequence, has to be protected and preserved.[314]

Article 1 of the 1966 UNESCO Declaration of the Principles of International Cultural Co-operation[315] states that "each culture has a dignity and value which must be respected and preserved" (paragraph 1) and that "all cultures form part of the common heritage belonging to all mankind" (paragraph 3). However, no clear definition of culture exists,[316] which makes the implementation of rights designed to preserve culture difficult. The main elements of identity are language and culture – the latter including religious practices. UNESCO identifies culture as:

> all that is inherited or transmitted through society, it follows that its individual elements are proportionally diverse. They include not only beliefs, knowledge, sentiments and literature …, but the language or other systems of symbols that are their vehicles. Other elements are the

[312] Ibid., paragraph 150.
[313] See for a general discussion about identity issues Chapter 1.
[314] See for example Article 29 and 30 CRC, Article 32 of the Migrant Workers Convention, Article 2, paragraph 2, sub-paragraph b of ILO Convention No. 169 regarding indigenous peoples, and Article 1.3 of the UNESCO Declaration on Race and Racial Prejudice.
[315] UNESCO Declaration of the Principles of International Cultural Co-operation of 4 November 1966, UNESCO Doc. 14C/8.I.
[316] See THORNBERRY, International Law and the Rights of Minorities, 187.

> rules of kinship, methods of education, forms of government and all the fashions followed in the social relations …[317]

LYNDEL V. PROTT distinguishes two meanings of culture: (1) culture in the meaning of the highest intellectual achievements such as literary, artistic, and scientific works and (2) culture in the broader sense of the totality of all practices and knowledge of all groups in a given society.[318] RODOLFO STAVENHAGEN introduces the ethnic dimension by adding to the two former concepts the meaning of culture as the sum of the material and spiritual activities of a group, which distinguishes it from other groups in the society. He accentuates the changes in the perception of culture over time and points out that the "emphasis is on the way people perceive their culture, on the discourse about culture, rather than on culture itself."[319] Special Rapporteur CAPOTORTI points out in his study about the rights of people belonging to minorities that cultural issues include the general policy regarding minorities, educational policy for children belonging to ethnic groups, development of arts and literature of a minority, diffusion of their culture, and measures adopted for the preservation of their customs and of their legal traditions.[320]

The recognition of culture as a justification for the protection of ethnic groups does not imply that all cultures or all cultural practices should be protected and promoted at any price.[321] The preservation of minority cultures and ethnic identity has to be seen against the background of international law recognizing the value of cultural diversity, the equality of all cultures, and as a result, the fact that all cultures deserve protection in order to secure their survival. This value is conditioned by other interests such that certain cultural practices may be limited or prohibited.[322]

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[317] *Race and Culture*, ed. UNESCO. Paris: UNESCO, 1951. 21.

[318] LYNDEL V. PROTT. "Cultural Rights as Peoples' Rights in International Law." In *The Rights of Peoples*, ed. James Crawford, 93-106. Oxford: Oxford University Press, 1988. 94.

[319] See RODOLFO STAVENHAGEN. "Cultural Rights and Universal Human Rights." In *Economic, Social and Cultural Rights – A Textbook*, ed. Asbjørn Eide, 63-77. The Hague: Kluwer Law International, 1995. 67.

[320] CAPOTORTI, Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1., paragraphs 327-385.

[321] SPILIOPOULOU ÅKERMARK speaks of a process similar to "an endangered species theory." SPILIOPOULOU ÅKERMARK, Justifications of Minority Protection in International Law, 83.

[322] For instance, ceremonial female genital mutilation is an unacceptable cultural practice as it violates basic human rights of the women affect (e.g., the right to physical integrity).

Members of minorities should not only have the possibility to receive their education in the minority language, but also receive some knowledge of their culture (also about cultures of other groups and the society at large). States should therefore adopt measures in the field of education that encourage knowledge of the history, traditions, language, and culture of their minorities. In this context, the right to use one's name in a way it is used within the minority group and the right to have street names and toponyms in the language of the minority as well as the majority constitute significant contributions to the preservation of ethnic culture.[323]

Identity issues are usually highly politicized and the degree to which identity matters are protected or promoted varies substantially between different countries. In *Sandra Lovelace v. Canada*[324] the complainant was a Maliseet Indian woman who had lost, under Canadian legislation, her status as an Indian as a result of marrying a non-Indian. After the divorce, she wanted to go back in the Topique reservation, which is the place where she was born and grew up. This was denied by Canadian authorities because of the said change of status. The HRC stated that restrictions affecting the right to residence on a reservation must have a reasonable and objective justification (paragraph 16). The denial to Sandra Lovelace to live on the reservation was not seen as reasonable or necessary to preserve the identity of the tribe, and as a result, the HRC concluded that the prevention of her recognition as belonging to the group constitutes a violation of her rights under Article 27 of the ICCPR.

Furthermore, transborder contacts between ethnic groups contribute to the preservation of minority cultures. State authorities have sometimes been suspicious of these interactions. However, even though there are cases of minorities participating in secessionist movements that posed a risk to the state, in general, minorities have fostered economic, cultural, and social cooperation across borders and thus supported the normalization of relations between states. They play a significant role in creating and determining the character of bilateral relations between countries.[325] It is thus important for the state to create a balance between its right to preserve its territorial integrity and the right of ethnic groups to interact with their kin groups across the border.

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[323] EIDE, Possible ways and means, paragraphs 202-205.

[324] *Sandra Lovelace v. Canada*, HRC Communication No. 24/1977, UN Doc. CCPR/C/OP/1 at 83 (1984).

[325] See about transborder contacts between minorities the Minority Rights Group International http://www.minorityrights.org/WorkshopReports/work_rep_chapterdetail.asp?ParentID=6&ID=38.

3.2 Empowerment

Claims to empower ethnic groups often involve the right to self-determination. As seen in the preceding chapters, this involves tensions with other concepts, especially the principle of state sovereignty. As a result, other possibilities such as participation, power-sharing arrangements and autonomy play an important role in the settlement of ethnic claims.

3.2.1 Participation

Among claims of ethnic groups is the demand to effectively participate in the internal affairs of a state. HRC General Comment No. 23 on Article 27 provides for "measures to ensure the effective participation of members of minority communities in decisions which affect them."[326] Few of the communications based on Article 27 of the ICCPR deal with effective participation of minorities.[327] Participation is reviewed under Article 25 of the ICCPR, but is not minority specific. Article 25 of the ICCPR reads:

> Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
>
> (c) To have access, on general terms of equality, to public service in his country.

The requirement of states to provide full participation to all ethnic groups has two aspects: First, the government must be comprised of all ethnic groups, and not just one.

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[326] HRC General Comment No. 23, paragraph 7.

[327] The only case that touches upon participation is *Gobin v. Mauritius* which aimed at denouncing a constitutional arrangement that was established to ensure the adequate representation of minorities in the legislature by forseeing special seats for members of minorities. The author, who got more votes in the election than a minority candidate, claimed that his rights under Article 26 ICCPR (non-discrimination) have been violated. The communication was found inadmissible because it was submitted five years after the elections without an explanation for the reason of this delay. *Gobin v. Mauritius*, HRC Admissibility Decision, no. 787/1997, UN Doc. CCPR/C/72/D/787/1997.

Second, the participation of the different groups must be effective.[328] It is not enough to have formal participation, such as the right to vote for all citizens, if the majority always outvotes the minority. States are required to develop appropriate and effective methods of participation for persons belonging to minority groups, meaning that minorities have an actual voice in the decision-making process. This includes the availability of informational materials and voting sheets in minority languages.[329] The electoral boundaries and methods of allocating votes should not distort the distribution of voters or discriminate against any group.[330] Securing a balance between giving minorities a vote and avoiding discrimination against the majority is an integral element of building a healthy minority-majority relationship.[331]

If a minority is not adequately represented or consulted in the political affairs or in legal proceedings of a state, the risk persists that unrepresented bodies will seek to pursue objectives or actions that are not supported by or in the interests of the minority or the community as a whole. It is therefore desirable to include some formal procedures in national legislation to ensure that the full range of opinions and claims are represented in the implementation of collective rights and duties. Measures include consultation, participation in elected bodies, and involvement in the preparation of national and regional programs.

The HRC suggested in the *Länsman*[332] and *Apirana Mahuika*[333] cases that meaningful forms of direct consultation provide a minimum way to enable minority groups to participate in the decision-making process. The way in which participation is granted must be determined by the state. In the *Marshall et al v. Canada*[334] case concerning the right to directly take part in the conduct of public affairs under Article 25, paragraph (a) of the ICCPR, the authors represented an indigenous group that complained about the violation of their right to participation in public affairs. They claimed that the Canadian government failed to

[328] Article 2, paragraph 3 of the UN Minority Declaration, paragraph 35 of the CSCE Copenhagen Document on the Human Dimension, and Article 15 of the Framework Convention.
[329] See HRC General Comment No. 25: Participation (Article 25), UN Doc. A/51 40 (1996), paragraph 12.
[330] Ibid., paragraph 21.
[331] EIDE, Possible ways and means, paragraph 67.
[332] *Jouni E. Länsman et al. v. Finland*, HRC Communication No. 671/1995, UN Doc. CCPR/C/58/D/671/1995 (1996), paragraph 10.5.
[333] *Apirana Mahuika et al. v. New Zealand*, paragraph 9.6.
[334] *Marshall v. Canada*, HRC Communication No. 205/l986, UN Doc. CCPR/C/43/D/205/l986 at 40 (1991).

consult the group on subjects that directly affect their interests and those of the group as a whole because they had not been invited to a constitutional conference on aboriginal matters. The Committee concluded that "it cannot be the meaning of article 25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives" and that "it is for the legal and constitutional system of the State party to provide for the modalities of such participation."[335] Article 25, paragraph (a) cannot be understood as meaning that any directly affected group has the right to choose the modalities of participation in the conduct of public affairs. Consequently, the HRC stated that participation at the conference was not subjected to unreasonable restrictions and that the complaint does not disclose a violation of Article 25 of the ICCPR.[336] Most other minority rights instruments link effective participation of minorities to their compatibility with "national legislation"[337], the "decision-making procedures", or "policies"[338].

Most cases of the HRC regarding participation deal with the effective involvement of minorities in public affairs and political life. There is a tendency to neglect participation of ethnic groups in social, economic, and cultural rights. One reason for this lack of attention is the fact that the HRC only deals with civil and political rights laid down in the ICCPR.[339] However, the HRC can also deal with economic and social rights through Article 26 (non-discrimination).[340] Other cases based on Article 25 deal with language rights,[341] rights of indigenous peoples,[342] and the influence of citizenship on participation rights.[343]

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[335] Ibid, paragraph 5.4.
[336] Ibid, paragraph 6. See also PENTASSUGLIA, State Sovereignty, 318/319.
[337] See Article 2, paragraph 3 of the UN Minority Declaration.
[338] See paragraphs 33 and 35 of the CSCE Copenhagen document.
[339] See VERSTICHEL, Recent Developments, 26.
[340] See for example *Zwaan-De Vries v. Netherlands*, HRC Communication No. 182/1984, UN Doc. CCPR/C/29/D/182/1984 (1987) or *Mümtaz Karakurt v. Austria*, HRC Communication No. 965/2000, UN Doc. CCPR/C/74/D/965/2000 (2002).
[341] See *Ignatane v. Latvia*, HRC Communication No. 884/1999, UN Doc. CCPR/C/72/884/1999 (2001).
[342] See for example *J.G.A. Diergaardt et al. v. Namibia*; *Länsman et al. v. Finland*, HRC Communication No. 511/1992, UN Doc. CCPR/C/52/D/511/1992 (1994); and *Apirana Mahuika et al. v. New Zealand.*
[343] See *Gillot v. France*, HRC Communication No. 932/2000, UN Doc. CCPR/C/75/D/932/2000 (2002).

3.2.2 Autonomy and Power-Sharing

Claims by ethnic groups to determine their own affairs often involve demands to autonomy and power-sharing. This implies the devolution of power to various degrees to the benefit of one or more minority groups, ranging from complex government systems of power-sharing to territorial autonomy and regimes of segmental or "cultural autonomy". Both autonomy and power-sharing can be viewed as a way of enhancing protection for minorities under domestic law. The CSCE Copenhagen document states that autonomy is one of the appropriate means to protect the identity of minorities and to secure effective participation.[344]

Different models of autonomy and power-sharing can be used depending on the structure of the state and the size and situation of the minority.[345] In cases where minorities are widely dispersed or not numerous enough to justify the creation of an autonomous region, functional or segmental autonomy may constitute an appropriate alternative. This may involve the delegation of administrative powers to minorities in respect to issues of particular concern, such as education, language, traditional social and economic systems, or cultural institutions. To avoid the development of two completely separate cultures in the state, it is important to guarantee minorities access and participation right on the state level.[346]

Territorial autonomy on a local or regional basis is likely to be the most appropriate form for regionally concentrated minorities in a well-defined area for which a degree of political, cultural and/or economic self-dependency is appropriate. The precise degree of autonomy and the extent to which it may be different from that enjoyed by other parts or provinces within the state is a matter of political negotiation.

Several issues have to be taken into account when examining the possibilities for territorial autonomy. First, the autonomy given should be entrenched in the constitution or an international agreement so that it cannot easily be altered. This provides minorities with a

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[344] CSCE Copenhagen document, paragraph 35.

[345] See for a more detailed discussion GEOFF GILBERT. "Autonomy and minority groups - a legal right in international law?" UN Doc. E/CN.4/Sub.2/AC.5/2001/CRP.5; and ASBJØRN EIDE. "Cultural autonomy and territorial democracy: a recipe for harmonious group accommodation." UN Doc. E/CN.4/Sub.2/AC.5/2001/WP.4.

[346] HANS-JOACHIM HEINTZE. "On the legal Understanding of Autonomy." In *Autonomy: Applications and Implications*, ed. Markku Suksi, 7-32. The Hague: Kluwer Law International, 1998. 21.

certain degree of security about their status even if the political context changes.[347] Second, the scope of autonomy has to be clearly defined, whether it is territorial or segmental autonomy. Third, the autonomy arrangement has to ensure that all citizens of the country enjoy equal human rights in all parts of the state. In almost every case there will be other communities with a different ethnic identity within the autonomous territory. It is thus important to ensure that the rights of these sub-minorities are granted and that they are protected against non-discrimination, inequality, or exclusion.

In societies with deep ethnic divisions, competition for political power often results in the domination of the majority group. Groups that fear marginalization mobilize for action that might threaten other groups. In order to avoid ethnic conflict, some countries have sought to balance power among different groups and to give groups the right to participation through democratic power-sharing. AREND LIJPHART's consociational model[348] introduces four markers of ethnic power-sharing. These include (1) a grand coalition, namely the joint exercise of governmental power, (2) proportionality in representation in government, (3) segmental autonomy, e.g. for education or cultural matters, and (4) mutual veto rights, which means that the minority can veto on issues important to the group.[349]

Power-sharing practices both build on and undermine essential human rights ideals.[350] On the one side, it is important to emphasize the potential of consociational arrangements for democracy. Consociation is the preferred model for power-sharing when the international community is involved in ethnic conflict resolution, as the examples of the power-sharing agreements in Afghanistan, Macedonia, Bosnia-Herzegovina, and Northern Ireland show.[351] All involve all four markers of consociations, but they also include international involvement to solve disputes between ethnic communities and in negotiating, mediating, arbitrating, and implementing peace settlements. Consociational agreements in

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[347] If, for example, a less "minority-friendly" government is elected.

[348] AREND LIJPHART. *Democracy in Plural Societies: A Comparative Exploration*. New Haven, CT/London: Yale University Press, 1977.

[349] Ibid. Belgium, Malaysia, Canada, India, and Nigeria are seen as typical examples. A more recent agreement is represented by the 1998 Peace Agreement in Northern Ireland.

[350] HENRY STEINER. "Ideals and Counter-Ideals in the Struggle over Autonomy Regimes for Minorities." *Notre Dame Law Review* 66 (1991): 1539-1560. 1545/1546.

[351] BRENDAN O'LEARY. "Debating Consociational Politics: Normative and Explanatory Arguments." In *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, ed. Sid Noel, 3-43. Montreal and Kingston: McGill-Queen's University Press, 2005. 3.

these cases address claims to self-determination between ethnic communities by institutionally recognizing more than one group and their minority rights, especially to determine their own affairs and their participation in public affairs. The establishment of the consociation is accompanied by a peace process, involving conflict resolutions measures, confidence- and capacity-building, as well as human rights mechanisms. Moreover, the cases combine power-sharing arrangements with territorial autonomy. International involvement in the making and implementation of power-sharing arrangements include international organizations, neighboring countries, regional and global powers, and countries with a history of "good offices" such as the U.S., Norway, Switzerland, and Canada.[352] The arrangements adopted in Bosnia and Herzegovina, Kosovo, or Northern Ireland confirm a broad and inclusive approach by the international community, thereby reshaping the concept and context of state sovereignty.[353]

On the other side, human rights advocates point out that consociational solutions to ethnic conflict are problematic. The idea of power-sharing contrasts sharply with the static absolutism of rights, as it is focused on processes of negotiation and compromise, which means winning some and losing some.[354] Consociational arrangements violate at least three human rights norms: first, similar to other minority protection regimes but to a greater extent, they explicitly differentiate among the members of a society on the basis of characteristics such as race, religion, and language instead of giving all individuals equal rights. Second, ethnic power-sharing models restrict the participation rights of members of the majority. And finally, because of the difficult election procedures and allocation of voting districts, consociational settlements violate the right to free movement and residence within a country.[355]

Article 2 of the ICCPR and the ICERD prohibits "any distinction, exclusion, restriction, or preference based on race, colour, descent or national or ethnic origin which

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[352] See for more details Ibid., 34- 36.

[353] PENTASSUGLIA, State Sovereignty, 324.

[354] ANNE-MARIE SLAUGHTER. "Pushing the Limits of Liberal Peace: Ethnic Conflict and the "Ideal Polity"." In *International Law and Ethnic Conflict*, ed. David Wippman, 128-144. Ithaca and London: Cornell University Press, 1998. 133.

[355] DAVID WIPPMAN. "Practical and Legal Constraints on Internal Power Sharing." In *International Law and Ethnic Conflict*, ed. David Wippman, 211-241. Ithaca and London: Cornell University Press, 1998. 230/231.

has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." The purpose of consociational agreements is not to nullify or impair the rights of the majority, but to protect ethnic minorities from marginalization. Still, power-sharing models have the effect of favoring one share of the population over another on the basis of their membership in an ethnic group, or at least on the basis of their residence in an ethnically defined subnational political unit.[356]

Consociational practices are acceptable as long as the differential distribution of power for the benefit of the ethnic groups does not infringe too much on the rights of the majority. According to the HRC, measures have to be "reasonable and objective", their aim should be "to achieve a purpose which is legitimate" under the ICCPR, and the measures employed have to be "proportionate" to the goals sought.[357] Consociational practices should not be seen as discriminatory rights for ethnic minorities, but as an opportunity for empowerment of ethnic groups to reach "equality in fact".

Consociational arrangements violate the rights of citizens to freely move and take residency within the state's borders as laid down in Article 12, paragraph 1 of the ICCPR. Consociational arrangements require some measures to exclude members of other ethnicities from residing in the minority region in order to prevent population movements from undermining proportions. Provisions for limited residence authorization for members of other groups violate international norms guaranteeing citizens the right to freely move within the boundaries of the state. However, similar to minority provisions, state practice accepts such provisions that are designed to protect ethnic identity of minorities. In general, such schemes are considered to be compatible with human rights norms and may be essential for the protection of minorities and minority cultures.

A popular way to respond to claims of territorially concentrated groups is the choice of federalism as a political system. Federations consist of at least two governmental units – the federal and the regional – that both enjoy separate constitutional competencies. There are two major ways of establishing federations: by unification or decentralization of existing

[356] Ibid., 231/232.
[357] HRC General Comment No. 18.

states. Unification means that separate units join together but retain a reserved domain within their unit (examples: Switzerland, U.S.). Decentralization is often a reaction to over-centralization (examples: Belgium, Spain).

Both the federal and the regional governments are empowered to deal directly with their citizens and are, in turn, elected by the citizens of their territory. The federal constitution can only be altered by the consent of both levels of government. Therefore, a federation implies a written constitution that is accompanied by a federal supreme court with the task to settle disputes between the federal units and a legislative system with two chambers – one representing the population proportionately and one representing the federal units (in which smaller units have a disproportionately high vote).[358] The distribution of competencies among federal units can vary from empowering the lowest constituent units to federations in which the regions enjoy less de facto power than those in centralized states.[359] In ethnically divided societies that choose federations as their system of government, boundaries of internal units are usually drawn along ethnic lines.

Power-sharing arrangements and autonomy should be evaluated against the available alternatives. Territorial autonomy is only an option for territorially concentrated groups. A "winner takes it all"-democracy as such is not enough to ensure fair rights for ethnic minorities and equal participation in the state's public affairs. Consociational arrangements may make some compromises on human rights ideals, but they help to avoid greater injustices.[360]

Many scholars have argued that solutions involving regional autonomy and power-sharing are effective in dealing with ethnic conflict. TED GURR, for instance, argues that "negotiated regional autonomy has proved to be an effective antidote for ethnopolitical wars of secession."[361] Likewise, KJELL-ÅKE NORDQUIST observes that creating autonomy "as a conflict-solving mechanism in an internal armed conflict is both a theoretical and – very

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[358] JOHN MCGARRY and BRENDAN O'LEARY. "Federation as a Method of Ethnic Conflict Regulation." In *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies*, ed. Sid Noel, 263-296. Montreal and Kingston: McGill-Queen's University Press, 2005. 263.

[359] Ibid., 264.

[360] STEINER, Ideals and Counter-Ideals, 1547/1548.

[361] See TED ROBERT GURR. "Peoples against States: Ethnopolitical Conflict in the Changing World System. *International Studies Quarterly* 28 (Fall 1994): 347-377. 366.

often – a practical option for the parties in such conflicts."[362] For GUDMUNDUR ALFREDSSON, autonomy and power-sharing are the most effective means of protecting a minority's dignity and cultural identity.[363] Nevertheless, governments are in many cases reluctant to grant autonomy to ethnic groups for several reasons. First, they fear that granting autonomy would be the first step toward secession of the region. Second, granting autonomy to a group can be discriminatory against other groups in the states. Third, some scholars argue that the risk of intervention by an outside powers affiliated with the group is increased by granting autonomy.[364] This is disputed as outside powers might have an even stronger incentive to intervene in a case in which a minority does not enjoy autonomy or other minority rights.[365]

In international law, no general right to autonomy or power-sharing has been established, whether or not in connection with internal self-determination.[366] The recognition of a right for minorities to some form of autonomy and/or power-sharing under international law would be desirable. However, states seem to be afraid that the right of minorities to have appropriate local or autonomous administrations may promote secessionist tendencies. Even those states that have granted a large degree of regional autonomy hesitate to accept binding international instruments on the right of minorities to certain autonomy. States fear that cultural autonomy leads to administrative autonomy that is followed by secession. Multiethnic federations seem to make it easier for groups to secede, as federalism provides the minority with institutional and administrative resources that can be used for the struggle for independence.[367] Multiethnic federations are prone to break

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[362] KJELL-ÅKE NORDQUIST. "Autonomy as a Conflict Resolution Mechanism – An Overview." In *Autonomy: Applications and Implications*, ed. Markku Suksi, 59-77. The Hague et al.: Kluwer Law, 1998. 59. See also *Federalism against Ethnicity? Institutional, Legal and Democratic Instruments to Prevent Violent Minority Conflicts,* ed. Günther Bächler. Zürich: Rüegger, 1997.

[363] See the conclusions in GUDMUNDUR ALFREDSSON. "Minority Rights and a New World Order." In *Broadening the Frontier of Human Rights. Essays in Honour of Asbjørn Eide*, ed. Donna Gomien, 55-77. Oslo: Scandinavian University Press, 1993.

[364] See RUTH LAPIDOTH. *Autonomy: Flexible Solutions to Ethnic Conflict*. Washington, D.C.: United States Institute of Peace Press, 1996. 203.

[365] See for example SVANTE E. CORNELL. "Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Persepctives." *World Politics* 54 (January 2002): 245-276. 247.

[366] PATRICK THORNBERRY. "Images of Autonomy and Individual and Collective Rights in International Instruments on the Rights of Minorities." In *Autonomy: Applications and Implications*, ed. Markku Suksi, 97-124. The Hague et al.: Kluwer Law, 1998.

[367] MCGARRY and O'LEARY, Federation as a Method, 274/275.

down, as the cases of Yugoslavia, the Soviet Union, Czechoslovakia, and examples in Africa and Asia (with the exception of India) illustrate.[368] However, other factors have to be taken into account when explaining the breakup of federations. First, some failed multiethnic federations were pseudo-federations in which the units had no de facto power. Second, in some cases the units were forced together (Soviet Union) or arbitrarily consolidated (former colonies). And third, both in the communist and post-colonial cases, the federations had economic problems (either regarding the system or regarding the functioning).[369]

Nevertheless, special treaties can recognize autonomy for minorities. Most prominently this was done in the aftermath of the First World War, but treaties can also be found in more recent practice, especially in Europe.[370] If a special treaty establishes autonomy for a minority, then the legal consequences generated by the treaty stem from the principle of *pacta sunt servanda* and not from international law in general or from human rights law in particular.

In sum, states are not obliged by international law to devolve authority on a territorial or non-territorial basis. There is no entitlement to autonomy for a minority as a group, regardless of whether it is in the context of self-determination. However, international institutions, in particular at the European level, see autonomy as a policy option for states within the broader framework of participation rights. For indigenous groups special instruments such as the ILO Convention No. 169 provide specific autonomy solutions as well as collective rights, which are different from those of minorities and other ethnic groups.[371]

Within these limits, autonomy regimes can be seen as compatible with the emerging view of internal self-determination of the "whole people" (as opposed to the *de facto* majority). Autonomy has several advantages. It constitutes a compromise balancing the conflicting claims of ethnic groups for self-determination and the state to keep up its territorial integrity. Furthermore, because autonomy is a flexible concept ranging from de

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[368] See *inter alia* O'LEARY, BRENDAN. "An Iron Law of Federations? A (neo-Diceyian) Theory of the Necessity of a Federal Staatsvolk, and of Consociational Rescue." *Nations and Nationalism* 7/3 (2000): 273-296; Federalism against Ethnicity, ed. Günther Bächler; and MCGARRY and O'LEARY, Federation as a Method, 281-287.

[369] MCGARRY and O'LEARY, Federation as a Method, 276-278.

[370] See Chapter 2.

[371] PENTASSUGLIA, State Sovereignty, 322.

facto independence to cultural autonomy, it may be tailored to specific situations in which ethnic conflicts evolve. According to GAETANO PENTASSUGLIA, autonomy schemes "stand for an inclusive human rights-based, democratic and pluralistic process, which ultimately provides the materially disaggregated individuals and groups comprising the 'whole' with meaningful choices on an occasional and permanent basis."[372] Autonomy should never have the aim of building ethnic states, but to "live diversity in unity respecting one another,"[373] thus bringing the institutions of the state closer to ethnic groups.

3.2.3 Secession and Independence

There are two main forms of ethnic claims to territorial adjustments affecting the territorial integrity of states: secessions and irredentism. Secession involves the withdrawal of a group and the territory it inhabits from the authority of the state. Irredentism entails the annexation of one territory to another state on grounds of ethnic ties.[374]

Secession has been treated favorably by international legal institutions only in a limited number of cases, which can be broken down into five major categories:[375]

(a) Mandated territories, trust territories, and territories treated as non self-governing under Chapter XI of the UN Charter;
(b) Distinct political-geographical entities subject to carence de souveraineté (the only case is Bangladesh, although this case is not easy to interpret);
(c) Other territories in respect of which self-determination is applied by the parties, such as holding a referendum to determine the faith of the territory;
(d) Highest level constituent units of a federal state which are in the process of being dissolved by agreement among all or the majority of the units (as was the case in the former Yugoslavia);

[372] Ibid., 323.
[373] Preamble of the Federal Constitution of Switzerland as of 18 April 1999, SR 101.
[374] See DONALD L. HOROWITZ. "Self-Determination: Politics, Philosophy, and Law." In *Ethnicity and Group Rights*, NOMOS XXXIX, ed. Ian Shapiro and Will Kymlicka, 421-463. New York, NY/London: New York University Press, 1997. 423.
[375] KINGSBURY, Claims by Non-State Groups in International Law, 161.

(e) Formerly independent entities reestablishing their independence with the consent of the state where its incorporation was illegal or of dubious legality (as it would be the case in Tibet).

Most secessionist entities have received minimal international recognition,[376] as it is illustrated by the Turkish Republic of Northern Cyprus.

The question of when secession should be treated favorably by international law leads to two major difficulties: first, the questions on how to draw a line when allocating territory, and second, if there are any special circumstances in which ethnic groups would have the right to secede.

First, at the core of the legal debate over territory of new states or autonomous regions lies the concept of *uti possidetis*. Originating in Roman law, *uti possidetis* was an edict that the praetor would issue to two parties claiming ownership of the same property, granting provisional legal possession to the possessor during the litigation.[377]

In modern international law, the principle of *uti possidetis* provides that states emerging from decolonization inherit the colonial administrative borders that they held at the time of independence.[378] It determined the shape and size of former colonial territories in Latin America, Africa, and Southeast Asia.[379] The ICJ has stated in the case regarding the *Frontier Dispute (Burkina Faso v. Mali)* that *uti possidetis* is not a special rule but a "general principle" and a "rule of general scope" in the case of decolonization.[380]

There are three reasons to rely upon the principle of *uti possidetis*.[381] First, *uti possidetis* reduces the probability of armed conflict by providing a clear outcome. If there is not a clear rule on how to draw borders, all borders would be open to dispute. Second, the conversion of internal borders to international borders is as sensible as any other approach, but far more

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[376] See for an overview BUCHANAN, ALLEN. *Secession: The Morality of Political Divorce from Fort Sumter to Lithuania and Quebec*. Boulder, CO: Westview Press, 1991.

[377] STEVEN R. RATNER. "Ethnic Conflict and Territorial Claims: Where Do We Draw a Line?" In *International Law and Ethnic Conflict*, ed. David Wippman, 112-127. Ithaca and London: Cornell University Press, 1998. 112.

[378] UNGA Resolution 1514 (XV), paragraph 4.

[379] See RATNER, Ethnic Conflict and Territorial Claims, 112/113.

[380] ICJ Judgment in the case concerning *Frontier Dispute (Burkina Faso v. Republic of Mali)* (1986), ICJ Reports 1986, 565.

[381] STEVEN R. RATNER. "Drawing a Better Line: *Uti possidetis* and the Borders of States." In *International Law and the Rise of Nations: The State System and the Challenge of Ethnic Groups*, ed. Robert J. Beck and Thomas Ambrosio, 250-283. New York, NY/London: Chatam House, 2002. 251.

simple. Borders will never fit the structure of society perfectly and some minorities will always be left out. Third, *uti possidetis* is a rule of international law mandating the conversion of administrative boundaries into international borders. It still applies to the disintegration of states today, which was confirmed by the findings of the Badinter Commission in the case of former Yugoslavia.[382]

The risk, however, is that a rule on how to break up states creates a hazard regarding territorial integrity and finality of states. Ethnic separatists might argue that the world could be divided further along more administrative lines.[383] Another problem is that *uti possidetis* may bring second best solutions, leaving minorities in unsatisfying conditions "on the wrong side of the border"[384] with the impossibility of making even small adjustments for the benefit of minorities. Furthermore, internal and international borders serve totally different purposes. While international borders separate states and peoples from one another, internal borders are drawn to more easily administer a country and to unify a polity. International borders serve to determine the limits of territorial jurisdiction of a state. Internal borders serve to govern a territory as a whole while at the same time devolving some authority to subnational levels. As such, the drawing of borders internally and internationally seek efficiency and simplicity in both cases, but for opposing purposes.[385]

The principle of *uti possidetis* is not a guarantor for emerging states to keep their borders. In a number of cases, new states did not assume their former administrative borders.[386] Some colonies, such as Rwanda and Burundi, split when gaining independence. Other states accepted compromises departing from a strict application of the principle.[387] *Uti possidetis* was not applied as a uniform practice, even though the UNGA and the ICJ tried to limit the scope of colonial countries allowed to determine their own borders.

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[382] Badinter Commission, Opinion No. 2, 1499.

[383] See HURST HANNUM. "Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles." *Transnational Law and Contemporary Problems* 3/57 (Spring 1993): 57-69. 69. This is actually the argumentation of Abkhasians in Georgia and the Kosovo Albanians in Serbia.

[384] RATNER, Ethnic Conflict and Territorial Claims, 114.

[385] Ibid., 116/117.

[386] As it was for example the case for Northern Cameroons that decided to become part of the Republic of Nigeria through a plebiscite held in 1960. See Case concerning the *Northern Cameroons* (Cameroons v. United Kingdom), Judgment of 2 Decemebr 1963, ICJ Reports 1963, 21-25.

[387] See for example the ICJ Judgement in the case concerning the *Arbitral Award made by the King of Spain on 23 December 1906 (Hunduras v. Nicaragua)* regarding the determination of the border between Honduras and Nicaragua. ICJ Reports 1960, 192/199/200. The ICJ refused to regard *uti possidetis* as overriding compromis given the fact that the court can consider other factors. ICJ Reports 1960, 215.

The application of the principle of *uti possidetis* today is based on three criteria. First, *uti possidetis* should form a starting point for the disposition of territories, but it should only serve as a provisional model and as a first step in a longer process of nation-building. If new states cannot agree upon the division of territories, *uti possidetis* and the respect for existing lines of control can give a first indication until an authoritative determination can be reached. The principle of *uti possidetis* cannot lead to a lack of engagement on the issue of how to draw borders. The international community and the countries involved must see if there is a significantly better option to determine the borders and withhold recognition of new entities until agreement is reached. There has to be scrutiny into the suitability of existing borders by international actors such as the UN and the ICJ.[388]

Second, border provisions must be implemented by peaceful means. The prohibition of the use of force as laid down in Article 2, paragraph 4 of the UN Charter does not apply to internal conflicts; but a dispute over a border can become international when the entities concerned are recognized internationally. This is confirmed by the EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, which recognizes the inviolability of all frontiers, can only be changed by peaceful means and by common agreement.[389]

Third, it is important that the people concerned have a voice in the whole process. There needs to be a form of consultation such as a referendum, which does not have to be a binding vote.[390]

The application of the *uti possidetis*-principle is the easiest short-term method for determining the borders of a state. In the long run however, a legal approach to separatist claims of ethnic groups should also include justice, legitimacy, and stability considerations. Any alternative will clearly be more difficult to implement than the status quo which may lead to the conclusion that *uti possidetis* should become an international legal rule for the breakup of states. However, neglecting the context of a certain situations may lead to greater

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[388] RATNER, Ethnic Conflict and Territorial Claims, 124-127.

[389] Declaration on the Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, 16 December 1991 See also DANILO TÜRK. "Recognition of States: A Comment." *European Journal of International Law* 4/1 (1993): 66-71.

[390] See ANTONIO CASSESE. Self-*Determination of Peoples: A Legal Reappraisal.* Cambridge: Cambridge University Press, 1995. 190.

dissatisfaction of people concerned and as a result, to more conflict and separatism. As STEVEN RATNER states: "Only a direct engagement of the territorial question, with all its complexities, is likely to control the breakup of states in a manner consistent with human dignity."[391] It is thus important to find a balance between the international legal rule and common sense in order to prevent conflict from emerging.

An interesting case in this context is the disintegration of the Socialist Federal Republic of Yugoslavia along the lines of its six republics (Serbia, Slovenia, Croatia, Bosnia-Herzegovina, Montenegro, and Macedonia). Kosovo never had the same status and is thus not entitled to gain independence under international law, despite an amendment of the constitution in 1974 that gave Kosovo *de facto* the same amount of autonomy. The key question that was posed to the international community was whether to follow the principle of *uti possidetis* or to introduce a new concept of "ethnic self-determination."[392]

The Badinter Commission maintained that in states where one or more groups constitute "ethnic, religious or language communities, they have the right to recognition of their identity under international law."[393] Furthermore, in the context of the collapse of Yugoslavia it stated that "every individual has the right to choose to belong to whatever ethnic, religious or language community he or she wishes."[394] However,

> The Committee considers that, whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise.[395]

The Badinter Commission accordingly rejected the separatist claims of groups within Bosnia and Herzegovina. This has caused dissatisfaction not only among the peoples living on the territory of former Yugoslavia, and also among academic scholars. ALEXANDER DOWES comments on the situation in Bosnia and Herzegovina after Dayton:

> The DPA [Dayton Peace Agreement] accepted the verdict of war – partition and ethnic cleansing – but at the same time sought to reverse it through power sharing and refugee return. The result has been gridlock: a large portion of the Croats in Herzegovina have left for Croatia; most Bosnian Croats and Serbs do not wish for their region to remain part of Bosnia;

[391] RATNER, Ethnic Conflict and Territorial Claims, 127.
[392] See PENTASSUGLIA, State Sovereignty, 309.
[393] Ibid.
[394] Ibid.
[395] Badinter Commission, Opinion No. 2, 1499.

> nationalist parties dominate the election process; and federal institutions function poorly, with Bosnia's international administrators repeatedly stepping in to dictate contentious decisions.[396]

He concludes that partition of Bosnia and Herzegovina along ethnic lines would be the better option.

The question of whether there are any special circumstances in which ethnic groups would have the right to secede must again be answered in a contextual way. A priori, minorities have no international right to secession. Article 8, paragraph 4, of the UN Minority Declaration states that: "Nothing in the present Declaration may be construed as permitting any activity contrary to the purposes and principles of the United Nations, including sovereign equality, territorial integrity and political independence of States." However, there are two cases in which this denial of a right to secession for ethnic groups can be contested: first, if the group is subject to serious suppression and/or human rights violation and second, if secession is an expression of the free will of all people concerned.

First, the right for ethnic groups to secession is subject to discussion if gross human rights violations are committed against them. The core commitment to the protection of human rights and democratic principles leads to the assumption of the right to secession as a last resort when these rights are denied to members of ethnic groups in a systematic and discriminatory manner.[397] This argument is not entirely new. In the Åland Islands case, the League of Nations Commission of Jurists denied that minorities have the right to secession except if the state is unable or unwilling to apply and enforce guarantees for them.[398] In a more recent scholarly debate, THOMAS FRANCK pointed out that if a minority is denied the preservation of its cultural identity and the state fails to promote measures for political and social equality, then repression can be viewed as a form of colonialism;[399] and as seen before, colonial peoples have the right to independence. Most advocates of such a secessionist claim

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[396] DOWNES, The Problem with Negotiated Settlements to Ethnic Civil Wars, 251.

[397] See DIANE F. ORENTLICHER. "International Responses to Separatist Claims: Are Democratic Principles Relevant?" In *Secession and Self-Determination*, NOMOS XLV, ed. Stephen Macedo and Allen Buchanan, 19-49. New York, NY: New York University Press, 2003. 25.

[398] *League of Nations Official Journal* 1 (1920): Special Supplement 3, 6.

[399] See for a detailed argument FRANCK, THOMAS M. "Post-Modern Tribalism and the Right to Secession." In *Peoples and Minorities in International Law*, ed. Catherine Brölmann, René Lefeber and Marjoleine Zieck, 3-27. Dordrecht etc.: Martinus Njjhoff, 1993. See also PENTASSUGLIA, State Sovereignty, 310-311.

base their arguments on the UN Friendly Relations Declaration, which suggests a link between territorial integrity and the existence of a government representing all people living within the boundaries of the state in compliance with the principle of equal rights and the self-determination of peoples.[400] The 1993 World Conference on Human Rights in Vienna reaffirmed this clause.[401] It is stated that an ethnic minority group that is subject to severe discrimination and denied access to participation in the government has the right to "correctional secession", meaning that the state looses its entitlement to the protection of its territorial integrity.

However, other scholars and jurisprudence contest this view. DONALD HOROWITZ argues that the purpose of secession, namely to create an ethnically homogenous state, is undermined as secession does not reduce conflict, violence, or minority oppression because there will always be minorities.[402] And ANTONIO CASSESE adds that the claim of ethnic groups to secession is incompatible with the idea of the state as a territorial and political unity; it would destroy order and stability within states and lead to anarchy in the international order.[403]

A more differentiated view is taken by the Canadian Supreme Court in its opinion concerning *Reference re Secession of Quebec*. The Court referred to "exceptional circumstances" in which a right to secession might arise under the international right of peoples to self-determination.[404] However, the Supreme Court stated "it remains unclear whether this proposition actually reflects an established international law standard."[405] Even if these circumstances were sufficient to create a right to unilateral secession under international law,

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[400] See UN Friendly Relations Declaration, second to last paragraph: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

[401] Vienna Declaration and Programme of Action, paragraph 2.

[402] See Horowitz argument in his article "A Right to Seceed?" DONALD L. HOROWITZ. "A Right to Seceed?" In *Secession and Self-Determination*, NOMOS XLV, ed. Stephen Macedo and Allen Buchanan, 50-76. New York, NY: New York University Press, 2003.

[403] See for example CASSESE, Self-Determination of Peoples. He goes as far to "rule out any right of secession." Ibid., 123.

[404] *Reference re Secession of Quebec*, paragraphs 112 and 132-135.

[405] Ibid., paragraph 135.

the Quebec people were not considered to be subject to "oppression".[406]

The "oppression" argument was used by the Katangese peoples to support their claim for independent statehood in the *Katangese Peoples Congress v. Zaire*[407] within the context of Article 20, paragraph 1 of the African Charter of Human and Peoples' Rights ("Banjul Charter"). The African Commission on Human and Peoples' Rights found no violation of Article 13 of the Banjul Charter (political participation), but did not argue that oppression would constitute a reason for a right to secession of the Katangese peoples under Article 20, paragraphs 1 and 2.

A second case questions whether the right to secession exists if it expresses the free will of the peoples concerned. The Canadian Supreme Court stated in its advisory opinion concerning *Reference re Secession of Quebec* regarding the question if Quebec had a unilateral right to secede that a clear expression of the democratic will of Quebecers to secede, for example through a referendum, would confer legitimacy to their request. However, this does not stand for a right to secede unilaterally. In the Court's view, the constitutional commitment to federalism and democracy of Canada had implications regarding secessionist claims:

> The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. [408]

And the Court went on:

> The corollary of a legitimate attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.[409]

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[406] Ibid., paragraph 15: "The Quebec people is not the victim of attacks on its physical existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the *amicus curiae*, an oppressed people."

[407] *Katangese Peoples' Congress v. Zaire*, African Commission on Human and Peoples' Rights Communication No. 75/92 (1995).

[408] *Reference re Secession of Quebec*, paragraph 88.

[409] Ibid.

Consequently, the Court denied that Quebec could unilaterally secede and thereby dictate the terms of secession to the other parties without negotiations.[410] Such negotiations ideally include three goals: incentives for mutual accommodation, a minimal risk of deadlock, and significant obstacles to secession such as constitutional guarantees protecting minorities.[411] The institutional design of the negotiations is a key challenge in achieving the first two interrelated goals aimed at mutual accepted outcomes. It is important that all sides have the same opportunities and strengths. The reason for the third goal lies in the fact that political and territorial adjustments usually mount into violent conflict. [412]

In sum, the predominant view in international law on the right of any group within a state to seceed, regardless of the claimed reasons for secession, is that secession is neither authorized nor prohibited by international law. However, the lack of a specific prohibition does not mean that secessionist claims are viewed as legitimate, given the emphasis that is put on the territorial integrity of states and the concept of the "whole peoples".[413] For that reason, the matter of secession is seen as part of the domestic jurisdiction of the affected state. If however, an ethnic group is able to create its own state out of political reasons rather than a legal right to secession, the international community is open to recognizing the new state within the limitations of certain conditions such as *uti possidetis* and the promotion and protection of human and minority rights.

3.3 Conclusion

From an international legal point of view, claims by ethnic groups pose serious questions touching upon fundamental principles of international law. The right to existence, equality and non-discrimination measures, and the question of the relationship between self-

[410] Ibid, paragraph 91: "We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all."
[411] See ORENTLICHER, International Responses to Separatist Claims, 33.
[412] See ALLEN BUCHANAN. "The Quebec Secession Issue: Democracy, Minority Rights, and the Rule of Law." In *Secession and Self-Determination*, NOMOS XLV, ed. Stephen Macedo and Allen Buchanan, 238-271. New York, NY: New York University Press, 2003.
[413] Also see PENTASSUGLIA, State Sovereignty, 312.

determination, autonomy/power-sharing arrangements, and secession are only the most important issues that arise. The conclusions that can be drawn are manifold.

First, the main human rights instruments do not prescribe any particular approach when dealing with claims of ethnic groups. Different approaches have been chosen by international actors and states depending on the size, history, and location (territorially concentrated v. dispersed, location near borders) of the ethnic group concerned. It is important to note that minority protection is a human rights concern regardless of its conflict potential. There is a lack of focus regarding the standards and guidelines for implementation of minority rights at the state level, especially regarding the development of procedures and capacity of national courts.[414] The international community has yet to develop a coherent political and legal approach to ethnic conflict and claims of ethnic groups.

Second, active protection and favorable treatment of minorities raises a set of problematic questions. It remains unclear how to define the acceptable level of difference in treatment granted to group members in comparison to the rest of the population or other minorities, especially regarding participation rights and minority-benefiting power-sharing arrangements.[415] Furthermore, certain participation regimes (notably autonomy) set obstacles to integrating the group into the larger context of the state, thereby working against the inclusive aims pursued by participation rights. International institutions, including the UN human rights treaty-monitoring bodies, usually concentrate on the right of minorities to separate institutions or treatment as opposed to policies to promote inclusion and integration. The emphasis on empowerment of ethnic groups should be on fostering interethnic accommodation within states rather than partition and secession. Internal self-determination should be understood as a right of the people to access political and economic power. It should be used as a synonym of democratization and power-sharing rather than the break-up of existing states.[416] This is not to say that secessionist claims should not be considered at all – the international community has to be open to special cases such as decolonization, the disintegration of multicultural federations, or the break-up of oppressive states. UN practice illustrates this argument; where three states in Eastern Europe stood in

[414] HADDEN, International and National Action, paragraph 14.
[415] See for example in Article 25 ICCPR the clause on access to public service "on general terms" of equality.
[416] AYOOB, State Making, State breaking, and State Failure, 140.

1989, twenty-two states are now members of the UN. In addition, the international community has recognized the independence of Eritrea and East Timor and has intervened in Kosovo to protect the Kosovar Albanians and detach the province from Belgrade's control. Ethnic and national calls for – *de facto* or *de jure* – independence have been satisfied in numerous cases since the early 1990s. Therefore, the most important task is to identify issues and scenarios in which either separatist or integrationist approaches may be most effective.[417]

Third, claims involving territory (territorial autonomy and secession) are especially delicate to handle in international law and prone to violent ethnic conflict. Territorial claims are usually an all-or-nothing matter and especially problematic; compromise is often looked upon as an act of treason.[418] The significance of territory lies primarily in its symbolic and historical importance for the group's identity, regardless of the extent to which claims match up with historical records.[419] The demand to secession and independence is the most difficult one to accommodate in international law and the option most prone to violent ethnic conflict. Ethnic separation as policy resolving ethnic conflict can encourage the break up of states, may transform civil war to an international war, and in the end, does nothing to resolve ethnic antagonism.[420] Furthermore, international law does not recognize a right to secession for ethnic groups.

Fourth, the default approach for promoting and protecting human rights standards is based heavily on Western liberal ideas of judicial enforcement. The effective use of this approach requires the existence of functioning political and legal institutions to perform the tasks of investigation, prosecution, and punishment. In situations of ethnic conflict, these requirements are usually not in place.

And finally, by implementing minority rights, states and societies will become more stable and less prone to violent conflict, to the benefit of both majorities and minorities. Political and legal approaches have to be combined, following a pragmatic approach of mixed law and politics that focuses on solving the problem at hand.

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[417] HADDEN and O MAOLAIN, Integrative Approaches to the Accommodation of Minorities.
[418] LEA BRILMAYER. "The Institutional and Instrumental Value of Nationalism." In *International Law and Ethnic Conflict*, ed. David Wippman, 58-85. Ithaca and London: Cornell University Press, 1998. 75.
[419] WOLFF, Ethnic Conflict, 48.
[420] KAUFMANN, Possible and Impossible Solutions, 169/170.

4. Ethnic Conflict Resolution within the International Legal System

The fact that ethnic conflict and its consequences are still prevalent in the international security arena reflects the failure of states to manage conflict and to create equal opportunities for minorities as well as the failure of the international community to effectively address and identify causes of ethnic conflict and to establish institutions to manage violent civil wars and its consequences.

Nevertheless, the international community, especially the UN, is an important actor in responding and resolving ethnic conflicts. The way in which the international community contributes to ethnic conflict resolution can take many forms, ranging from military intervention to international mediation and the monitoring of human and minority rights.

Effective management of ethnic conflict by local elites, governments, other states, and international organizations must be based on some fundamental premises. First, in order to be able to reassure the physical and cultural security of a threatened ethnic group, any measures taken must involve not only the ending of violence, but also confidence-building and human rights strengthening measures, which underline the whole process. Second, promoting and protecting minority rights during conflicts or immediately afterwards in so-called "weak" or "failed" states is qualitatively different from promoting and protecting human rights in a functioning state (see below).[421] And third, the international community has to develop the capacity for prevention, peace building, and conflict resolution. The UN and other international organizations should encourage states to find solutions for ethnic conflicts on the basis of international law.

The UN acts in four types of situations involving ethnic conflict: (1) activities in situations that are not characterized as an open conflict, (2) activities in situations that are characterized as an open political conflict, including small-scale violence, (3) activities in

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[421] See Tonya Putnam's conclusions. TONYA L. PUTNAM. "Human Rights and Sustainable Peace." In *Ending Civil Wars: The Implementation of Peace Agreements*, ed. Stephen J. Stedman, Donald Rothchild, and Elizabeth M. Cousens, 237-270. Boulder, CO: Lynne Rienner, 2002.

situations which may constitute a threat to international peace and security, and (4) post-conflict situations.[422]

First, in situations not characterized as open conflicts, a number of institutions and mechanisms exist, some preventive and some responsive in character. Key roles have been played by UN human rights treaty monitoring bodies, especially the HRC and the CERD. The UNESCO's role on language and education is preeminent, as is UNICEF and the Committee on the Convention on the Rights of the Child (CRC) regarding rights of children in minorities, and the ILO regarding indigenous peoples. Reporting under all these convention can have a significant preventive function. The interaction between the states and the UN bodies can be a constructive dialogue regarding the legal situation, as well as the nature of conflict in a particular situation. Through reviewing reports, the committees are able to gain knowledge about particular situations that can be significant for early warning purposes. Collaboration with regional organizations such as the COE, OSCE, African Union, and Organization of American States may further develop the knowledge and opportunities to strengthen human rights protection.

Second, in situations in which open conflicts occur, human rights mechanisms dealing with gross human rights violations become relevant. These include the ECOSOC "1503 procedure" and country or subject specific rapporteurs. Different parts of the UN have to be brought together to work on a solution for the conflict.

Third, when the conflict has escalated into a threat to international peace and security, primary responsibility will be with the UNSC. Nevertheless, human rights bodies still have a role to play.

And finally, the UN also engages in post-conflict situations. Activities include electoral assistance, decolonization support, help with transition to democracy and the establishment of the rule of law, drafting constitutions, designing administrative and financial reform, strengthening domestic human rights laws, enhancing judicial structures, training human rights officials and monitors, and helping rebel and paramilitary troops to demobilize and transform themselves into democratically competitive political parties.[423]

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[422] See for the categories GUDMUNDUR ALFREDSSON and DANILO TÜRK. "International mechanisms for the monitoring and protection of minority rights." *In Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms*, ed. Arie Bloed et al., 169-186. Dordrecht: Martinus Nijhoff, 1993.

[423] SCHEFFER, U.N. Engagement in Ethnic Conflicts, 154.

Given the broad range of activities, the UN has to consolidate different approaches and strategies. The following chapters show that this is not always easy. Human rights approaches diverge with conflict resolution approaches, the need for humanitarian intervention is contested by the principle of non-interference in domestic matters of states, and the coordination among numerous UN agencies and organizations is an immensely complex task, further complicated by the involvement of other actors such as the International Committee of the Red Cross (ICRC), human rights and conflict resolution NGOs, and national and local agencies in the field.

4.1 Ethnic Conflict Resolution and Human Rights Activities

Ethnic conflict resolution comprises a variety of fields. Scholars and practitioners of social sciences, especially political science, psychology, and sociology, law, public policy, and even health sciences try to find a universal approach towards conflict resolution. However, unlike human rights, there is no codified set of norms that govern the field – only a set of principles that frame the practice: (1) participation, (2) inclusion, (3) empowerment, (4) cultural sensivity, and (5) equity.[424]

The first principle is that of participation. The most effective negotiation and decision-making processes are those in which the parties who have direct stakes in the outcome are actively part of the process. Identifying parties and bringing them into some kind of *ad hoc* or institutionalized forum is the most basic goal of conflict resolution.

The second principle is inclusion, which differs from participation as it does not address the manner of participation, but rather who participates. The preferred approach in the conflict resolution field is to include as many stakeholders as possible, even those who might be disruptive. The reason for an inclusivist approach is to bind as many parties as possible to the agreement in order to diminish the probability that the agreement is undermined by those left on the side lines.

[424] See "Ethnic Conflict, Minority Protection and Conflict Resolution: Human Rights Perspectives, an Interdisciplinary Discussion held at the Rockefeller Foundation Conference in Bellagio, Italy, October 2001." *Harvard Law School Human Rights Program* (2004): 1-113. 38/39.

The third principle is empowerment. One or more parties' lack of experience, lack of resources, or both can compromise the effectiveness of multi-party dialogue. Thus, conflict resolution in practice includes learning, teaching, and coaching parties in conflict to maximize the effectiveness of negotiation strategies used by parties and provide a stronger basis on which negotiations might proceed.

Cultural sensitivity, the fourth principle on which conflict resolution is based, takes into account that most cultures have existing methods for dealing with conflict. Culturally familiar and appropriate approaches will be sustainable long after the negotiation process is over. Consequently, it is very important to know these practices and to include them in the negotiation process. Furthermore, conflict resolution practices can build upon and enhance indigenous methods.

Finally, the fifth principle is equity. Equity, as opposed to equality, is the notion that the mediator should be impartial and treat all parties with equal respect, giving them equal time and attention despite differences in power and influence. Impartiality and respect contribute to the effectiveness of the negotiation process and to constructive discussion and problem solving.

Conflict resolution consists of two parts: conflict management and conflict settlement. Conflict management is an attempt to contain the effects of an ongoing conflict, including the distribution of humanitarian aid, peace keeping, the monitoring of ceasefires or peace agreements, and containment of spillover effects. Conflict settlement, on the other hand, is aimed at establishing long-term stability and peaceful coexistence between former enemies. Both attempts require significant contributions from the international community. Rarely any ethnic conflicts are solved without active third-party intervention.[425] It is vital for the peace process that the commitment by the international community is convincing. If ethnic groups are uncertain whether peacekeeping forces will arrive, whether the forces deployed can effectively protect them, or whether forces will stay until the demobilization and

[425] See BARBARA F. WALTER's conclusion in BARBARA F. WALTER. *Committing to Peace: The Successful Settlement of Civil Wars.* Princeton, NJ: Princeton University Press, 2001.

compliance with the agreement is reached, the role of international actors is undermined and the mission is likely to fail. [426]

Conflict settlement programs are designed to support the transition from war to peace, democracy, rule of law, stability, and economic prosperity. The building of credible, accountable, and transparent institutions is crucial for this process, especially regarding the creation of a civil society in which mutual trust is more common than distrust (see below). Ideally, strategic coordination establishes clear lead actors in the mediation and implementation of peace agreements. Coordinators should be able to set priorities, ensure that those priorities are pursued by all the third-party actors and relief agencies involved, and provide consistency across phases of a political process. Lead actors should also be given the authority to settle disputes between third parties about the necessary steps.[427]

To achieve the resolution of an ethnic conflict, the international community uses on different "tracks" of intervention: Track 1, Track 1½, and Track 2.[428] At the Track 1 level, official interveners such as representatives of governments or international organizations work with designated representatives (usually decision-makers) of the conflicting parties to assist them in reaching a solution to the conflict. Sometimes these interveners are neutral, but often they use their power to press the parties to reach an agreement.

At Track 1½ level, non-official interveners such as NGOs, religious leaders, scholars, or internationally respected political figures meet with official representatives of the parties. Track 1½ negotiators do not offer incentives or sanctions to compel the parties to reach agreement, but their personal qualities, mediation skills, and reputation for impartiality and high ethical standards may bring parties to agree to participate in the resolution process.

At Track 2 level, non-official interveners facilitate dialogue among non-official, but influential members of each of the conflicting parties. The theory behind Track 2 diplomacy is that influential individuals, operating in unofficial capacity, have fewer constraints than official representatives. Their scope to engage in dialogue with their counterparts and to

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[426] More detailed BARBARA F. WALTER. "Designing Transitions from Civil War: Demobilization, Democratization, and Commitments to Peace." *International Security* 24/1 (Summer 1999): 127-155. 154.

[427] See more detailed BRUCE D. JONES. "Challenges of Strategic Coordination: Containing Opposition and Sustaining Implementation of Peace Agreements in Civil War." *International Peace Academy Policy Paper Series on Peace Implementation* (June 2001): 1-36. 11.

[428] See more detailed ELLEN L. LUTZ, EILEEN F. BABBITT, and HURST HANNUM. "Human Rights and Conflict Resolution from the Practitioners' Perspective." *Fletcher Forum of World Affairs* 27/1 (Winter/Spring 2003): 173-194.177/178.

explore creative ideas for the resolution of the conflict is broader and may lead to progress. At the same time, because Track 2 participants are prominent, they might have the ability to influence decision makers or they may be in official decision-making positions in the future.

However, the conflicting parties are not in all cases willing to work for peace and give their consent with international involvement. Some instruments depend significantly on the consent of parties such as humanitarian aid, mediation and negotiation, peace keeping operations, fact-finding and monitoring, and assistance in technical matters (infrastructure, economic assistance). Arms embargoes, economic sanctions, judicial enforcement measures, and military intervention are used in cases in which parties do not agree to the involvement of the international community or in which rapid reaction to gross human rights violations is needed.[429]

The strategies for managing ethnic conflict are summarized in Table 3[430] and explained in the following chapters.

[429] BROWN and DE JONGE OUDRAAT, Internal Conflict and International Action, 163/164.

[430] Adapted from CHESTER A. CROCKER, FEN OSLER HAMPSON, and PAMELA AALL. "Introduction." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson and Pamela Aall, xv-xxix. Washington, D.C.: United States Institute of Peace Press, 2001. xxiv-xxvi.

Table 3: Strategies to manage ethnic conflict

Sources of conflict	**Coercive strategies and instruments**	**Negotiation, mediation, other political instruments**	**Institutions and regimes of security and conflict management**	**Peacebuilding**
Anarchy and changing balance of power, break up of states	Power balancing, alliances and alignments	Diplomacy based strategies of negotiation	Collective and cooperative security	"Confederation of democratic states or regions" (Kantian Model)
Regional and hegemonic rivalries	Power balancing, alliances and alignments, military-assistance programs, sanctions, peace enforcement	Diplomatic engagement or isolation, pressures and incentives for adherence to international norms, UN engagement	Strengthened arms embargoes, new security institutions	New or expanded institutions for regional cooperation and integration, especially on economic and political issues
Weapons proliferation that change existing power balances between ethnic groups and threaten international peace and security	New technologies and strategies (e.g. missile defense, information warfare, high-tech weaponry), arms embargoes, air strikes against ammunition depots	Negotiated understandings and agreements, preventive diplomacy, inclusion in international forums dealing proliferation	Arms control regimes and confidence building measures	
Global non-military security threats evolving of ethnic conflicts (e.g., international criminal networks, economic destabilization, environmental degradation, population pressures)	Judicial enforcement measures through international criminal tribunals, Interpol, bilateral and multilateral cooperation	Negotiated understanding and agreements, preventive diplomacy	International good governance and cooperation on both the global and the regional levels	
Transitional states	Peace enforcement, conflict suppression, targeted sanctions, coercive diplomacy	Mediation, dialogue, Track 1 and 2 diplomacy, financial incentives and aid, conditionality	Collective security initiatives, involvement of the UNSC and regional organizations, membership inducements, threats of expulsion or non-membership	Good governance, reconciliation, reconstruction, development assistance, civil-society institution building, human rights capacity-building, rule of law, accountability, preventive diplomacy

State collapse	Rapid reaction force, military protectorates, humanitarian intervention	Multilateral assistance programs, financial aid, conditionality	Temporary multilateral governance structures, transitional justice and interim administrations by international actors	
Ethnic extremism, including the use of genocidal strategies	Rapid reaction force, humanitarian intervention, coercive diplomacy, deterrence, preventive diplomacy	Negotiated settlements, cross-cultural and multiparty negotiations, monitoring of minority rights and human rights, humanitarian and financial aid, conditionality	Constitutional and electoral reforms, power-sharing, federalism, consociational democracy	Support for confidence-building and reconciliation measures, strengthening of civil society, strengthening of minority rights protection, monitoring of ceasefires, governance structures, and human rights
Lack of compliance with international standards and negotiated settlements in post-conflict situations (reemergence of violent conflict)	Coercive intervention and diplomacy, targeted sanctions, judicial enforcement measures	Support for non-violent movements, engagement in isolation and delegitimization of violent parties, diplomacy, problem-solving workshops	Denial of membership or expulsion from international institution, multilateral incentives and pressures	Accountability, power-sharing/autonomy arrangements, conflict transformation initiatives, civil society building

Any international approach to minority issues and ethnic conflict must be based on the respect for individual human rights and for the principles of international law concerning friendly relations and cooperation among states with the UN Charter. However, in some cases it is difficult to combine these two approaches because they start from significantly different underlying assumptions, have different goals, and use different practices. As a result, both groups adopt contradictory or even mutually exclusive approaches.

Assumptions. The greatest tension between the human rights and conflict resolution fields lies between the human rights activists' focus on justice for past crimes and conflict resolvers' desire to promote peace and reconciliation. Or as a human rights activist put it: "The two communities [human rights and conflict resolution] have different parents. The human rights community believes that people are bad and need laws because there will always be war, while the conflict resolution community believes people are good and that there is an ideal world without war."[431] In other words:

> [H]uman rights people and conflict resolution people don't speak the same language. They come from different backgrounds and there is a lot of suspicion between them. Human rights people are judgmental and tend to come from a legal background, whereas conflict resolution people are more interested in stopping hot conflict and are willing to rub hands with bad actors.[432]

Goals. For human rights activists, the most important goals to achieve in a post-conflict settlement are the strengthening of local human rights organizations, increasing the public awareness of rights, reforming laws to match international human rights standards, and monitoring compliance with human rights provisions. In the short-term, human rights advocates aim to pressure governments and other parties to end human rights violations and to ensure the accountability of the perpetrators. In the long run, human rights activists seek to generate worldwide protection of human rights. The approaches adapted to reach long term goals include the expansion of international human rights law and enforcement

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[431] Comment by a human rights activist at a Carnegie Council Workshop. "Bridging Human Rights and Conflict Resolution: A Dialogue Between Critical Communities." *Carnegie Council Workshop Report*, 16-17 July 2001. http://www.cceia.org/viewMedia.php/prmID/161 ("Carnegie Council Workshop Report").

[432] BARBARA FREY, former executive director of the Minnesota Advocates for Human Rights, cited in LUTZ, BABBITT, and HANNUM, Human Rights and Conflict Resolution from the Practitioners' Perspective, 174.

procedures, as well as pressing states to ensure that their domestic laws and judiciary address human rights adequately and meet international standards. [433]

Among the conflict resolvers, common goals include creating an atmosphere for conflict resolution efforts, encouraging research and education in conflict prevention and conflict resolution, introducing cooperative approaches to former adversaries, fostering dialogue among conflicting parties, and strengthening civil society prevention mechanisms. Short-term goals of peace workers include fostering dialogue, helping the parties to reach a settlement, and decreasing levels of violence. In the long term, conflict resolvers facilitate the improvement of relations between groups in order to achieve greater inter-personal and institutional capacity for the conflicting parties. The prevention of the reoccurrence of violence and the changing of behaviors, assumptions, and attitudes of former conflict parties are the most important goals in the short-term.[434]

Practices. Human rights approaches are based on "naming and shaming" – by naming the violator, it is hoped to put enough public pressure on the actor to abandon its abusive behavior. The political and legal methods include the gathering and publication of information about human rights abuses, expressing formal disapproval of the methods used by the violator though UN procedures or mechanisms of regional organizations, and lobbying "human rights friendly" governments to take corrective action and press the violator to comply with international standards. As such, human rights strategies are often adversarial and confrontational, based on the belief that human rights work must be transparent and public. By contrast, conflict resolvers assist the key stakeholders to engage in a process directed at ending violence. They tend to emphasize cooperative approaches in their work. These differences in ends can create tensions between practitioners in the field. The release of human rights reports that identify the violators at the moment the parties agreed to negotiate a peace agreement can be devastating for the whole resolution process.[435] The work of one community can have unintended severe consequences for the other. Human rights reporting can be devastating to those trying to mediate the conflict because it

[433] LUTZ, BABBITT, and HANNUM, Human Rights and Conflict Resolution from the Practitioners' Perspective, 179.
[434] Carnegie Council Workshop Report.
[435] Ibid.

openly identifies the perpetrators, which can have negative consequences on the peace process. Even where peace negotiations are not in progress, human rights reporting can have unintended effects, e.g., by stimulating anger from the ones identified as violators and misuse by representatives of the victims to promote their position. This may lead to increased polarization and the unwillingness of a party to participate in the negotiation process at all. Most human rights groups are aware of these risks and they try to minimize them by maintaining a reputation for accuracy, impartial reporting, and measuring abuses against widely accepted legal norms.[436] The problem is not only what message is delivered, but also how and when.

On the other side, conflict resolution work may hinder human rights organizations to meet their goals. The issue of amnesty, for example, may help the peace process in the short term, but lets the perpetrators go unpunished and thus counters international human rights law. More generally, because mediators see peace as the most important goal, they might make compromises on human rights issues by e.g. not addressing the behavior of armed groups and security personnel.[437]

However, conflict resolution and human rights can have mutually reinforcing relationships. Conflicts are often fueled by human rights abuses, and addressing them can become an integral part of the peace process. Human rights work is also a tool of policy analysis and strategy formulation, as abuses can be an early warning for escalating conflict. Mediators can address human rights issues while negotiating agreements. The respect for human rights is a necessary condition for lasting peace, and conflict resolution creates the environment in which human rights abuses usually decrease.

Furthermore, human rights education, promotion, and monitoring can play an important role in the reconciliation process and in preventing conflict from reoccurring. The emphasis on individual accountability rather than collective guilt can be critical in order for the peace process to move forward.[438] Moreover, both approaches rely on the same premises: impartiality and neutrality. This is also the approach pursued by the UN. The

[436] LUTZ, BABBITT, and HANNUM, Human Rights and Conflict Resolution from the Practitioners' Perspective, 188/189.
[437] Ibid.
[438] Carnegie Council Workshop Report.

Report of the Panel on United Nations Peace Operations (so-called "Brahimi Report") states regarding peace operations:

> Impartiality for such operations must therefore mean adherence to the principles of the Charter and to the objectives of a mandate that is rooted in those Charter principles. Such impartiality is not the same as neutrality or equal treatment of all parties in all cases for all time, which can amount to a policy of appeasement. In some cases, local parties consist not of moral equals but of obvious aggressors and victims, and peacekeepers may not only be operationally justified in using force but morally compelled to do so.[439]

Conflict resolution scholars are not neutral about human rights. While most take the view that reaching an agreement that stops violence is the first priority, many question whether it is acceptable to focus only on achieving a settlement while human rights abuses are still occurring. Raising human rights issues during the negotiation process and pointing out that the protection of human rights and sustainable peace are intertwined may help a broader understanding of past abuses and overcoming of the post-conflict situation.[440] Preventing wars and massive human rights violations, rebuilding of societies after a conflict, and establishing functioning institutions requires an approach that incorporates the experience of both human rights and conflict resolution research and practice. Coordination between human rights and conflict resolution activities is thus vital for the peace process. In the short run, both communities seek to end violence and limit suffering and the loss of lives. In the long run, both communities assist the war-affected population in becoming stable and non-violent societies in which human rights are respected.[441]

The UN pursues a human rights-oriented approach to conflict resolution. The internationalization of ethnic conflict resolution has resulted in a higher awareness of and concern with human rights aspects of peace implementation. As a result, the tension between conflict resolution and human rights is less significant than in the past. However, neither approach is coherent when dealing with ethnic conflicts. The two main actors, namely the OHCHR whose primary concern are human rights and the Department of

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[439] Report of the Panel on United Nations Peace Operations ("Brahimi Report"), UN Doc. A/55/305-S/2000/809, paragraph 50.

[440] LUTZ, BABBITT, and HANNUM, Human Rights and Conflict Resolution from the Practitioners' Perspective, 190.

[441] LUTZ, BABBITT, and HANNUM, Human Rights and Conflict Resolution from the Practitioners' Perspective, 173.

Political Affairs (DPA) whose focus is politics and diplomacy, have yet to find a strategy that addresses ethnic conflict in an inclusive approach. Human rights and development need to be seen as core elements of peace building from the beginning and not just as "add-ons" to security in the long run. Conflict resolution is only successful if it goes hand in hand with advocating respect for human rights.[442] Conflict resolution, economic development, good governance, post-conflict reconstruction, and human rights are intertwined and mutually reinforcing.

4.2 UN Institutions and Instruments Dealing with Ethnic Conflict

The international community has a vast range of possibilities for dealing with ethnic conflict. These options vary according to the status, form, and level of violence of the conflict and the character of the society in which the conflict occurs, namely if its institutions are democratic or authoritarian in nature and if there is some basic infrastructure the international community can build upon.[443] The opportunities for engagement also depend on the character of potential third parties – for example on their capabilities, leverage, linkage to the conflicting parties, their interest, and the sustainability of their commitment.[444] Any policy addressing ethnic conflict depends on whether: (1) objectives are well articulated, clear, consistent, and underlined by an adequate causal theory; (2) the policy is legally structured to enhance compliance of implementers and conflicting parties; (3) implementers are committed, well resourced, and skillful; (4) the policy is supported by all actors involved, including the conflicting parties, the state, the peoples, and the international community; (5)

[442] HURST HANNUM. "Human Rights and Conflict Resolution: The Role of the Office of the High Commissioner for Human Rights in UN Peacemaking and Peacebuilding." *Human Rights Quarterly* 28/1 (2006): 1-85. 23/24.

[443] An engagement of the international community can be very different when intervening in a conflict taking place in a Western country (e.g. Northern Ireland) than intervening in a Sub-Saharan African conflict (e.g. DRC), especially regarding financial aid needed and the efforts to establish basic infrastructure and democratic institutions.

[444] CROCKER, CHESTER A. "Intervention: Towards Best Practices and a Holistic View." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson and Pamela Aall, 229-248. Washington, D.C.: United States Institute of Peace Press, 2001. 233.

the socioeconomic and political environment is relatively stable; and (6) the target of the policy is highly vulnerable.[445]

The UN role of establishing and maintaining peace and security rapidly expanded in the early 1990s. The Agenda for Peace identifies five interconnected field of action for the UN:

- *Preventive diplomacy*. Preventive diplomacy "is action to prevent disputes from arising between parties, to prevent existing disputes from escalating into conflicts and to limit the spread of the latter when they occur."[446] It includes confidence-building measures, fact-finding, early warning, and the preventive deployment of UN authorized forces. Preventive diplomacy seeks to reduce the danger of violence and increase the prospects for a peaceful settlement of conflict.[447]
- *Peace making*. Peacemaking is designed "to bring hostile parties to agreement, essentially through such peaceful means as those foreseen in Chapter VI of the Charter of the United Nations."[448] Drawing upon judicial settlement, mediation, international negotiation, and other forms of dispute settlement, UN peace making initiatives are aimed at persuading conflicting parties to engage in a peace process and settle the differences in a peaceful way.[449]
- *Peacekeeping*. Peacekeeping "is the deployment of a United Nations presence in the field, hitherto with the consent of all the parties concerned."[450] Confidence and capacity building are the focus of peacekeeping operations. This involves both monitoring of ceasefires by UN troops as well as diplomatic efforts to mediate and implement peace agreements.[451]
- *Peace enforcement*. Peace enforcement goes beyond peace making and peace keeping as actions can be taken with or without consent of the conflicting parties. Acting under Chapter VII of the UN Charter, the UNSC can authorize military forces to ensure

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[445] See STEPHEN J. STEDMAN. "Policy Implications." In *Ending Civil Wars: The Implementation of Peace Agreements*, ed. Stephen J. Stedman, Donald Rothchild, and Elizabeth M. Cousens, 663-671. Boulder, CO: Lynne Rienner, 2002. 663.
[446] Agenda for Peace, paragraph 20.
[447] Ibid., paragraphs 23-33.
[448] Ibid., paragraph 20.
[449] Ibid., paragraphs 34-41.
[450] Ibid., paragraph 20.
[451] Ibid., paragraphs 46-54.

compliance with a ceasefire and/or a peace agreement. Under the direction of the UNSG, peace enforcement missions would have a mandate that includes the use of force to implement peace.[452]

- *Post-conflict reconstruction*. Post-conflict reconstruction is designed to foster economic, political, and social cooperation among parties, to establish confidence, to develop the necessary infrastructure and institutions to prevent further violence, and to lay down the foundations for a stable and durable peace.[453]

The following chapter will analyze UN involvement in ethnic conflict resolution, following a "chronological" approach: starting with UN engagement in ethnic conflict prevention, the study then analyzes how the UN deals with ethnic violence, acts as a mediator, becomes involved in post-conflict reconstruction, and establishes institutions of accountability.

4.2.1 Prevention of Violent Ethnic Conflict

Despite the fact that the UN has recognized that "prevention is better than cure,"[454] there has been little engagement in preventive action. Institutions equipped with the tools, procedures, and means to interpret early warning signs of conflict and to engage in early action in situations involving minorities remain largely absent.

An inclusive conflict prevention strategy involves two tracks: structural and operational prevention. Structural conflict prevention deals with the causes of the conflict such as social, political, and economic inequality, poverty, and weak or failed governance. It aims at the long-term prevention of conflict and seeks to strengthen human rights, the rule of law, and democracy. Thus structural conflict prevention is more than just a response to an outbreak

[452] Ibid., paragraphs 42-45.
[453] Ibid., paragraphs 55-59.
[454] KOFI A. ANNAN. "*We the Peoples": The Role of the United Nations in the 21st Century*. New York, NY: United Nations, 2000. 44.

of conflict or an increase in ethnic tensions.[455] As UNSG KOFI ANNAN states: "Every step taken towards reducing poverty and achieving broad-based economic growth is a step towards conflict prevention."[456]

Operational prevention[457] is designed to stop a conflict from becoming violent, to de-escalate an existing conflict, and/or to prevent the resumption of violent hostilities in a post-conflict situation. Operational conflict prevention includes early warning, preventive diplomacy, disarmament, and preventive deployment. It addresses the "symptoms" and short-term outcomes of a conflict.

The UN engages in both structural and operational prevention. This chapter focuses more on operational prevention because it is more directly connected with the emergence, dealing with, and ending of ethnic conflict.

A strategy of non-coercive action that proved to be very successful – especially in the European context – is preventive diplomacy. Preventive diplomacy can be defined as the actions, policies, and institutions used to keep states or groups from threatening or using organized violence, armed force, or other forms of coercion as the way to settle their interstate or internal political disputes, especially where and when existing means cannot peacefully manage the destabilizing effects of economic, social, political, and international change.[458] Measures include negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement. These can be very different, depending on the case. In the words of UNSG KOFI ANNAN: "Just as the root causes of armed conflict may vary widely, the nature of appropriate preventive actions and the resources needed to implement them cover a broad spectrum."[459]

Preventive diplomatic measures are most likely to be successful in cases where the positions of the conflicting parties are not yet fully consolidated. Once a situation explodes

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[455] See more detailed RENATA DWAN. "Consensus: a challenge for conflict prevention." In *Preventing Violent Conflict: The Search for Political Will,* ed. SIPRI, 9-16. Stockholm: SIPRI, 2000. 11/12.

[456] ANNAN, We the Peoples, 45.

[457] Other classifications include outbreak prevention, escalation prevention, or relapse prevention (the latter refers to the reemergence of the conflict).

[458] See MICHAEL S. LUND. *Preventing Violent Conflicts.* Washington, D.C.: United States Institute of Peace Press, 1996. 37.

[459] Prevention of Armed Conflict, Report of the Secretary-General, UN Doc. A/55/985–S/2001/574, paragraph 62.

into a violent conflict, the chances of successful diplomatic engagement are substantially reduced. The strengthening of regional and global institutions for diplomatic engagement through assistance-based, problem-solving approaches has thus to be accompanied by measures for coercive intervention, through sanctions and military force if necessary, in case diplomatic efforts prove insufficient. Given the vast human and economic costs of a coercive intervention, the increasing reluctance of states to contribute to military measures, and the uncertainty of outcomes of coercive action, it is important to direct more attention and resources towards diplomatic engagement and identification of stages where non-coercive measures can make a difference.

Preventive diplomacy missions should be informal, low-profile, non-binding, non-judgmental, non-coercive, and confidential.[460] The emphasis is on the process and on the outcome, in particular on the political arrangements that might accommodate claims of different groups.

In 2001, ANNAN proposed to rename "preventive diplomacy" as "preventive action":

> Conflict Prevention is particularly favoured by Member States as a means of preventing human suffering and as an alternative to costly politico-military operations to resolve conflicts after they have broken out. Although Preventive Diplomacy is a well-tried means of preventing conflict, and is still the primary political measure preventing and resolving conflicts, United Nations' experience in recent years has shown that there are several other forms of action that can have a useful preventive effect, including: preventive deployment; preventive disarmament; preventive humanitarian action; and peace-building undertaken in preventive context. These can involve, with the consent of the Government or Governments concerned, a wide range of actions in the fields of good governance, human rights and economic and social development. For this reason, the Secretary-General has used the concept preventive action rather than "preventive diplomacy" when addressing the root causes of conflict.[461]

Preventive diplomacy is successful when "things do not happen". As a result, its successes are quiet and do not get much media attention. This might be a reason why the UN devotes relatively few resources to preventive diplomacy.

Early warning and conflict prevention should be regarded as useful management tools as well as an ongoing learning process in developing responses to economic, social, and

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[460] See the description of preventive diplomacy in EVANS, Cooperative Security and Intrastate Conflict, 16.
[461] See the statement published on http://www.un.org/depts/dpa/french/prev_dip/fr_prev_dip_introduction.htm.

humanitarian crises.[462] They have to be strengthened within the UN context. Efforts to establish an effective preventive diplomacy strategy include the establishment of a position similar to the High Commissioner on National Minorities (HCNM) in the context of the OSCE. The High-Level Panel on Threats, Challenges and Change specifically recommended that the UN, "should build on the experience of regional organizations in developing frameworks for minority rights."[463] The UN Secretary-General has commended the HCNM for his work and called upon other inter-governmental organizations, including the UN, to consider establishing a similar institution.[464] The Report of the International Commission on Intervention and State Sovereignty on the topic "Responsibility to Protect" includes a whole chapter on the responsibility to prevent. The report states:

> Without a genuine commitment to conflict prevention at all levels – without new energy and momentum being devoted to the task – the world will continue to witness the needless slaughter of our fellow human beings, and the reckless waste of precious resources on conflict rather than social and economic development. The time has come for all of us to take practical responsibility to prevent the needless loss of human life, and to be ready to act in the cause of prevention and not just in the aftermath of disaster.[465]

The link between human rights and prevention of armed conflict is indirect. Human rights norms and actions do not have the goal of preventing armed conflict. However, they have important early warning functions; the deterioration of the human rights situation might be a first sign for growing tensions, especially in a situation in which ethnicity matters. Reports of the Special Rapporteurs, the OHCHR, and NGOs can contribute to the political analysis of situations in danger of ethnic conflict.

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[462] See overall NYGREN KRUG, Genocide in Rwanda, 165-213.

[463] See "A more secure world: Our shared responsibility" - Report of the Secretary-General's High-Level Panel on Threats, Challenges and Change, United Nations ("High-Level Panel Report"), UN Doc. A/59/565 (2004).

[464] Speech by the UN Secretary-General to the OSCE Summit in Istanbul, 18 November 1999. See also "Sharing Best Practices on Conflict Prevention: the UN, Regional and Subregional Organizations, National and Local Actors." *International Peace Academy Policy Report* (2002): 1-20. 6.

[465] Responsibility to Protect, paragraph 3.43.

4.2.2 Dealing with Ethnic Violence and Violations of Human and Minority Rights

As seen in Chapter 1, ethnic conflict poses a threat to international peace and security. The UNSC has under Article 24 of the UN-Charter the responsibility to maintain international peace and security. Threats to peace under the terms of Article 39 of the UN Charter are increasingly associated with internal conflicts and non-military sources of conflict where human rights issues are at stake.[466] Furthermore, the UNSC acted under Chapter VII in a number of ethnic conflicts such as Kosovo (1999) and Iraq (1991). Depending on the case, the UNSC has condemned gross human rights violations such as ethnic cleansing, demanded ceasefires and the peaceful settlement of ethnic conflicts, appealed to the UN member states to contribute to the relief efforts, called for the supervision of peace and the implementation of the provisions of peace settlements by UN missions, and decided on economic sanctions and coercive measures.

The UN can take two approaches to address ethnic conflicts that pose a threat to international peace and security: non-coercive and coercive intervention. The term "intervention" describes a whole range of methods and tools which include different actors who use different instruments to intervene in a variety of societies at various times in the life cycle of a conflict. Whether or not non-coercive measures or coercive intervention are chosen depends on several factors: the stage of conflict, character of the society and nature of the conflicting parties, character of third parties (capabilities, linkage to the parties, interests), and the instruments and means of intervention (military or non-military intervention, for example diplomatic intervention).[467]

Non-coercive interventions can be helpful in shaping behaviors of group leaders in order to comply with international norms for the purpose of recognition, acceptance, and inclusion of their group in the international community. Protest, pressure, and assertions of international norms are important as they raise the costs of unacceptable behavior, especially

[466] See detailed BERTRAND G. RAMCHARAN. "The Security Council: Maturing of International Protection of Human Rights." *International Commission of Jurists Review* 48 (1992): 24-37.
[467] See for an overview of means and possibilities to intervene CROCKER, Intervention, 233-236.

when other alternatives are offered.[468] State behavior can be connected to inclusion or exclusion in a regional or international community (conditionality of membership). This strategy, most prominently adopted by the EU, proves to be very successful, as it sets positive incentives for states to improve their human rights legislation. However, when conflicts are intense and gross human rights violations are committed, naming and shaming, international pressure, and exclusion from international and regional organizations might not be enough to prevent further abuses and dissuade determined leaders from their course. In this case, coercive interventions might be more successful.

Coercive external interventions have two primary effects. On the one side, they can alter the balance of power between ethnic groups and may lead groups to moderate their demands. Interventions always have political implications as they typically favor the weaker side in any conflict. This reduces the stronger side's chances for success which restrains its demands. On the other side, the weaker side is likely to increase its demands and ask for more in negotiations with international involvement than it would have without external intervention.[469]

The objective of coercive sanctions imposed by the UNSC under Chapter VII of the UN Charter is to "maintain or restore international peace and security" (Article 39). According to Article 41, the UNSC:

> may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

If the UNSC decides to impose economic sanctions under Chapter VII of the Charter, all UN member states are required to carry out these measures. In the context of "the responsibility to protect", the International Commission on Intervention and State Sovereignty states that "when preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by

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[468] See EDMOND J. KELLER. "Transnational Ethnic Conflict in Africa." In *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation*, ed. David A. Lake and Donald Rothchild, 275-292. Princeton, NJ: Princeton University Press, 1998. 288/289.

[469] See DONALD WITTMAN. "How a War Ends: A Rational Model Approach." *Journal of Conflict Resolution* 23/4 (December 1979): 743-763.

other members of the broader community of states may be required. These coercive measures may include political, economic or judicial measures, and in extreme cases – but only extreme cases – they may also include military action."[470] The most important coercive measures are political and economic sanctions and military interventions.

Sanctions are coercive non-military measures that restrict or arrest normal international economic exchange with a state or a non-governmental group, with the purpose of changing the political or military behavior of the government or group in question.[471] They are political, not legal in character. Underlying the theory of sanctions is the expectation that economic pressures transform into political effects. Economic sanctions can affect the trade of the country as a whole or only part of its goods, such as oil (comprehensive v. partial sanctions). They may limit or ban exports (embargoes) or imports (boycott).[472] Arms embargoes are imposed to restrict military capabilities and induce military stalemates that prevent conflicts from escalating.

Sanctions are attractive for policy makers, as they are a good way to express concern while at the same time seemingly minimizing risks and costs. Sanction regimes are not as disputed as military measures. However, some sanctions, especially economic measures, harm civilians, including the ones whose rights the international community tries to protect.[473]

Sanctions need to be part of a comprehensive strategy addressing the conflict as a whole. The potential of sanctions is strengthened when combined with the threat to use military enforcement measures, signaling that the international community is serious. Second, third parties need to implement sanctions and grant compliance with the imposed regime. Broad international consensus facilitates this task. To ensure that neighboring countries, which might be partially dependent on the economic exchange with the target

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[470] Responsibility to Protect, paragraph 4.1.

[471] See CHANTAL DE JONGE OUDRAAT. "UN Sanction Regimes and Violent Conflict." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson and Pamela Aall, 323-352. Washington, D.C.: United States Institute of Peace Press, 2001. 324.

[472] Ibid.

[473] The sanctions imposed on Iraq after the Gulf War led to starvation and decreasing living standards among the common population whereas the leading elite remained largely unaffected. See for example DENIS J. HALLIDAY. "The Deadly and Illegal Consequences of Economic Sanctions on the People of Iraq." *Brown Journal of World Affairs* 7 (2000): 229-234.

country, comply with sanction regimes, monitoring and enforcement mechanisms as well as compensation and assistance need to be established. Third, sanctions are only a short-term measure as they have serious economic and social effects on an already conflict-affected society.[474] If a change of behavior of the target state cannot be achieved thorough economic sanctions, other measures have to be taken into account.

The track record of UN sanction regimes has been mixed. One reason for this is the fact that most of the sanction regimes were isolated measures and not part of an overall strategy to stop violence. In addition, little attention was given by third parties to the implementation of sanctions and to compliance.[475]

States have a long history of intervening militarily in the ethnic affairs of other states.[476] Military action can take the form of unilateral action (UK in Sierra Leone in 2000); of an *ad hoc* "coalition of the willing" (U.S., UK, and allied forces in Iraq); a UN-authorized multilateral action (intervention in Gulf War 1991); UN peace keeping operations (UN mission in Mozambique 1992-1994); regional peacekeeping or peace enforcement (NATO in Kosovo); and UN-mandated actions led by a global or regional power (Australian-led mission in East Timor).

Peace operations with UNSC authorization can be established in two ways. First, if peace operations are established by the UNSC under Chapter VI UN Charter, they emerge from the negotiated consent of the parties and through a series of "status of forces" agreements that specify the legal terms of the presence of foreign forces. Second, peace operations can be established by the UNSC under Chapter VII authorizing intervention without the consent of the parties. Troop-contributing countries negotiate the terms of the participation of their forces under UN command (e.g. El Salvador and Cambodia), under the command of a regional organization (delegated authorization as provided by Chapter VIII UN Charter), or under the leadership of a multinational "coalition of the willing" (such as the U.S.-led intervention in Somalia or the Australian-led intervention in East Timor).[477]

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[474] DE JONGE OUDRAAT, UN Sanction Regime, 343.
[475] See for a comprehensive review of multilateral sanction regimes Ibid., 325-336.
[476] See for an overview KRASNER and FROATS, Minority Rights and the Westphalian Model, 227-250.
[477] See also MICHAEL W. DOYLE. "Strategy and Transitional Authority." In *Ending Civil Wars: The Implementation of Peace Agreements*, ed. Stephen J. Stedman, Donald Rothchild, and Elizabeth M. Cousens, 71-88. Boulder, CO: Lynne Rienner, 2002. 73.

The immediate objective of UN action in ethnic conflicts is to prevent the conflict from spreading by monitoring a ceasefire, establishing a "buffer zone", or stopping an aggressor in case of peace enforcement.[478] The UNSC authorizes an intervention in order to stabilize the situation and end violence through negotiations aiming at a peace settlement and/or a ceasefire, prevent further atrocities and human suffering, facilitate the delivery of humanitarian assistance, prevent the reoccurrence of conflict, and support the reconstruction of post-conflict society and institutions. In the words of former UNSG BOUTROS BOUTROS-GHALI, peace operations seek "to identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict."[479] This is a tremendous task. As LAKHDAR BRAHIMI observes, peace operations have become more difficult because:

> our expectations and agendas are not getting any more realistic. Instead, they have become more ambiguous and multifaceted, seeking to promote justice, national reconciliation, human rights, gender equality, the rule of law, sustainable economic development and democracy—all at the same time, from day one, now, immediately, even in the midst of conflict.[480]

UN peace operations today usually include a human rights component, mostly under the institutional leadership of the Special Representative of the Secretary General (SRSG) in the field. Human rights advisors and a human rights unit need to form an integral part of the mission structure and feed into overall policy formulation.[481] The human rights component is particularly important when dealing with ethnic groups. Minority rights provisions in combination with relevant political arrangements form a pillar for sustainable and durable peace in divided societies. The failure to ensure a meaningful presence of criminal justice and human rights experts during the creation of policy and drafting of legislation can result in irregular policy decisions and unlawful regulations. The United Nations Interim Administration Mission in Kosovo (UNMIK) and the Kosovo Force (KFOR) have

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[478] See for an overview of objectives SCHEFFER, U.N. Engagement in Ethnic Conflicts.

[479] Agenda for Peace, paragraph 55.

[480] LAKHDAR BRAHIMI, cited in BARBARA CROSSETTE. "The UN's Top Envoy Speaks Out, but Who's Listening?" *U.N. Wire*, 18 July 2004.

[481] "Synthesis Report." In *A Review of Peace Operations: A Case for Change*, ed. Conflict, Security and Development Group, International Policy Institute. London: King's College, 2003. Paragraph 47.

demonstrated a disregard for international human rights and as a result, have severely damaged the development of these principles in Kosovo.[482]

Military or humanitarian intervention is probably the most significant action the UN can undertake in response to ethnic conflicts. Humanitarian intervention "is the threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending of widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied."[483] Few can argue against the moral imperative of humanitarian interventions, but there is a debate about the legality of humanitarian interventions and whether it is the best means to bring relief to civilians.[484] The question whether and under what circumstances humanitarian intervention should be permitted is part of a current, polarizing debate.[485] The complexity of the matter has resulted in little scholarly consent.[486]

Since the end of the Cold War, the understanding of humanitarian intervention has changed. The defining moment was the Gulf-War in 1991. The Security Council responded

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[482] See DAVID MARSHALL and SHELLEY INGLIS. "Human Rights in Transition: The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo." *Harvard Human Rights Journal* 16 (Spring 2003): 95-146. 145.

[483] See J.L. HOLZGREFE. "The Humanitarian Intervention Debate." In *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane, 15-51. Cambridge: Cambridge University Press, 2003. 18.

[484] Also referred to as the "just cause" for intervention. C.A.J. COADY. "The Ethnics of Armed Intervention." *United States Institute of Peace Peaceworks* 45 (July 2002): 1-47. See also Der Kosovo Krieg – Rechtliche und rechtsethische Aspekte, Demokratie, Frieden, Sicherheit Band 127, ed. Dieter S. Lutz. Baden-Baden: Nomos, 1999.

[485] A brief contemporary sampling includes STANLEY HOFFMANN. "The Debate about Intervention." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson and Pamela Aall, 273-283. Washington, D.C.: United States Institute of Peace Press, 2001; ROBERT COOPER and MATS BERDAL. "Outside Intervention in Ethnic Conflicts." In *Ethnic Conflict and International Security*, ed. Michael E. Brown, 181-206. Princeton, NJ: Princeton University Press, 1993; in general *Humanitarian Humanitarian Intervention: Ethical, Legal, and Political Dilemmas*, ed. J.L. Holzgrefe and Robert O. Keohane. Cambridge : Cambridge University Press: 2003; TONNY BREMS KNUDSEN. *Humanitarian Intervention : Contemporary Manifestations of an Explosive Doctrine*. London: Routledge, 2003; and CHRISTOPH HENKE. *Die humanitäre Intervention : völker- und verfassungsrechtliche Probleme unter besonderer Berücksichtigung des Kosovo-Konflikts*. Dissertation. Münster, 2002.

[486] See for example the different essays in *Intervention in World Politics*, ed. Hedley Bull. Oxford: Clarendon, 1984, especially MICHAEL AKEHURST,. "Humanitarian Intervention." 95-118.; ROSALYN HIGGINS. "Intervention and International Law." 29-44; and STANLEY HOFFMANN. "The Problem of Intervention." 7-28. Also see LORI FISLER DAMROSCH. "Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs." *American Journal of International Law* 83 (1989): 1-50; and the books and articles cited in footnote 62.

to the invasion of Kuwait by the Iraqi military with a military intervention based on the right of Kuwait to self-defense and the role of the Security Council in case of aggression. When Iraq withdrew from Kuwait, the reason for the intervention disappeared. The Security Council then turned to a radically new interpretation of Chapter VII of the UN Charter: it authorized the intervention in the name of the protection of ethnic and religious minorities within Iraq itself. Resolution 688 (1991) provided the legal background for the military intervention as well as the economic embargo.[487] The precedent it established led to a range of other initiatives, which previously had been unthinkable, in other parts of the world: in Somalia, Rwanda, Haiti, Bosnia and Herzegovina, Kosovo, East Timor, and possibly in the future in Darfour.[488]

What was different about these new interventions was the UN involvement and the fact that issues such as ethnic tensions, which were formerly regarded as domestic affairs, became a matter for the UNSC. The Council took the view that internal developments, especially refugee flows, could threaten international security. Massive human rights violations and ethnic persecution became, in themselves, reasons for applying Chapter VII.

However, the use of humanitarian intervention to protect ethnic groups today depends on the fulfillment of several criteria. In order for the UN to take action, (1) not just any human right but the most basic rights, especially the right to life, must be under threat; (2) there is no prospect that the government will do anything to relieve the suffering or resolve the situation; (3) non-military options have been considered and tried where appropriate; (4) a report from a third impartial and neutral source, such as the ICRC, has confirmed that the humanitarian crisis can not be managed without outside intervention; (5) widespread expert consultation has shown that there is no other solution; (6) consultation with the parties of the conflict have taken place; (7) consensus on the matter between developed and developing countries (in the UNGA for example) has been reached; and (8) it must be ensured that there are attempts not only to intervene in the short-term, but also to support

[487] UNSC Resolution 688 (1991).

[488] For more details see WILLIAM A. SCHABAS. "International Law and Response to Conflict." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, 603-618. Washington, D.C.: United States Institute of Peace Press, 2001. 606/607.

the war-affected state in its reconstruction, monitoring of human rights and economic development.[489]

Even if most or all of these criteria are fulfilled, the legality and necessity of humanitarian intervention is disputed by politicians and international lawyers. The most controversial case is the intervention by NATO in Kosovo. The 1999 NATO intervention in Kosovo was a response to the massive violations committed by the Serb authorities against Kosovo Albanians. The intervention was accomplished after attempts to reach a peaceful solution had failed. It raised the question of whether the use of force without UNSC authorization should be permitted if it aims at protecting populations from large-scale human rights violations. The classical scholarly and jurisprudential view is that the threat and use of force is prohibited under international law (as stated in Article 2, paragraph 4 of the UN Charter).[490] Under the UN Charter, a state can only use force for individual or collective self-defense (Article 51) or when military action has been decided by the UNSC to address threats or breaches of international peace and security. In the case concerning *Military and Paramilitary Activities in and against Nicaragua,*[491] the ICJ denied that any kind of unilateral humanitarian intervention can serve as a justification for the use of force. Some experts argue that a new customary rule might emerge permitting the unilateral use of force for the purpose of ending gross human rights violations constituting a threat to international peace, especially in the case of the UNSC's inability to act and if there is a lack of other possibilities.[492] The matter of "pro-human rights" military intervention was supposed to be reviewed by the ICJ in the case concerning *Legality of Use of Force* (*Serbia and Montenegro v. a*

[489] EVANS, Cooperative Security and Intrastate Conflict, 17/18.

[490] See for an overview on the doctrinal debate: *The Current Legal Regulation of the Use of Force*, ed. Antonio Cassese. Dordrecht: Martinus Nijhoff, 1986; DIETRICH SCHINDLER and KAY HAYBRONNER. "Die Grenzen des völkerrechtlichen Gewaltverbots." *Berichte der Deutschen Gesellschaft für Völkerrecht* 26 (1986): 1-169; and *Necessity, Proportionality and the Use of Force by States*, ed. Judith Gardam, James Crawford, and John Bell. Cambridge: Cambridge University Press, 2004.

[491] ICJ Judgment (Merits) in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA),* ICJ Reports 1986.

[492] See for example DANIEL THÜRER. "Der Kosovo-Konflikt im Lichte des Völkerrechts: Von drei - echten und scheinbaren - Dilemmata." *Archiv des Völkerrechts* 38/1 (2000): 1-22; and ANTONIO CASSESE. "*Ex iniuria ius oritur*: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" *European Journal of International Law* 10 (1999): 23-30.

number of Western countries)[493], but the court dismissed the case on the basis of lack of jurisdiction.

Furthermore, if defined very strictly, intervention involves unauthorized coercive interference in the domestic affairs of another state.[494] However, as we have seen, there is no clear border between internal and international affairs between domestic and international jurisdiction where ethnic conflict is concerned. A relative approach driven by law and politics has to be decided for a given case in a given time. Thus, what has been regarded as prohibited at one time can become permissible international action another time in a different situation. The PCIJ stated as early as 1923 that "[t]he question of whether a certain matter is or is not solely within the jurisdiction of a state is an essentially relative question; it depends on the development of international relations."[495]

As a result, the legality of the NATO actions in Kosovo is uncertain at best. Some authors argue that unilateral action should not be legalized in any situation as the intervening state often pursues its own interest.[496] On the other side, the broad participation of regional organizations, combined with the fact that no major international actor, like the UNGA, condemned the action of NATO, suggests the permissibility of the practice.[497] Other scholars argue that the multilateral use of force to protect persons from gross and systematic human rights violations should be legal even without UNSC authorization.[498] They consider the cause of the UN charter to be more important than its procedure. DANIEL THÜRER, for example, regards unilateral intervention as permissible whenever the fundamental values of the international society are threatened, the intervention is proportional, and the measures

[493] See the ICJ Judgment in the case concerning *Legality of Use of Force (Serbia-Montenegro v. Belgium)*, ICJ Reports 2004.

[494] JACK DONNELLY. "Human rights, humanitarian crisis, and humanitarian intervention." *International Journal* 48 (1993): 607-640. 608.

[495] PCIJ Advisory Opinion, *Nationalities Decrees in Tunis and Morocco*; PCIJ Series B 4 (1923). 24.

[496] See MICHAEL BOTHE. "The Legitimacy of the Use of Force to Protect Peoples and Minorities." In *Peoples and Minorities in International Law*, ed. Catherine Brölmann, René Lefeber and Marjoleine Zieck, 289-299. Dordrecht etc.: Martinus Njjhoff, 1993. 298/299.

[497] The UN-Charter allows regional arrangements for enforcement action, although approval by the Security Council is required. Chapter VIII, Article 52.

[498] This view is supported for example by KELLY KATE PEASE and DAVID P. FORSYTHE. "Human Rights, Humanitarian Intervention, and World Politics." *Human Rights Quarterly* 15 (1993): 290-314.

are authorized by a "legitimate organ". He adds that measures have to be brought back as soon as possible to the procedures laid down in the UN Charter.[499]

This underscores the shift in international law away from claims of absolute sovereignty of states to a conditional sovereignty based on an adherence to the bare minimum of human rights standards. However, these recent cases and developments show that a modern doctrine of humanitarian intervention and clear legal criteria is needed as a better guide for the international community in responding to humanitarian challenges.[500]

Aside from the question of the legality of the use of force, humanitarian intervention in ethnic conflicts raises several political, economic, and social issues. First, the success of international intervention depends on a number of factors: a developed institutional framework and a set of policies that enable decisions to be made quickly, adequate funds and personnel, and the cooperation of all different parties and actors involved. Intervention is an unusual event.[501] Weak commitments produce ambiguous policies that may, in the end, contribute to rather than solve the conflict.[502] Humanitarian interventions must have a reasonable chance of success. A reasonable chance of success requires the willingness by the states to bear certain costs and to launch an effort that is sufficient to be successful.[503] The international community has had no such willingness in Rwanda, and more recently in Darfour, and many other places that are considered strategically less important by major powers of the world today.

Second, raising domestic support for expensive UN operations in other parts of the world that do not directly affect the national interests of the country presents another problem. This is not only a problem regarding financial but also human resources. The fear of casualties among their own troops leads to reluctant commitment by states.

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[499] See THÜRER, Der Kosovo-Konflikt im Lichte des Völkerrechts, 8. See also W. MICHAEL REISMAN. "Criteria for the Lawful Use of Force in International Law." *Yale Journal of International Law* 10 (1985): 279-285; FERNANDO R. TÉSON. *Humanitarian Intervention: An Inquiry into Law and Morality*. New York, NY: Transnational Publishers, 1997[2]. 157-162; and DAVID M. KRESOCK. "Ethnic Cleansing in the Balkans: The Legal Foundations of Foreign Intervention." *Cornell International Law Journal* 27 (1994): 203-239. 234-237.

[500] DAVID J. SCHEFFER. "Toward a Modern Doctrine of Humanitarian Intervention." *The University of Toledo Law Review* 23 (1992): 253-293.

[501] See MARC TRACHTENBERG. "Intervention in historical perspective." In EMERGING NORMS OF JUSTIFIED INTERVENTION, ed. Laura W. Reed and Carl Kaysen, 15-36. Cambridge, MA: American Academy of Arts and Sciences, 1993.

[502] See LAKE and ROTHCHILD, Containing Fear, 151-155.

[503] HOFFMANN, Debate about Intervention, 277.

Third, humanitarian intervention presupposes a clear distinction between oppressors and victims, which is usually not the case in reality.[504] Perpetrators and victims are often intermingled and, especially for outsiders, not clearly distinguishable.[505]

Fourth, the issue of proper authority creates a dilemma: in order to have a "reasonable chance of success", interventions have to be quick and strong. UN authorization usually involves bureaucratic inefficiencies as well as political, economic, and legal obstacles such as states opposing the action (especially if veto powers oppose each other), the decision on the mandate for a particular mission (peace keeping v. peace enforcement), and the problem of financial constraints and scarce resources.

Fifth, critics also question if humanitarian interventions respect the principle of proportionality. Interventions often impose high costs on the beneficiaries – regarding both human suffering and economic costs.[506]

Sixth, there is the problem of humanitarian intervention being a means of "last resort". Waiting too long in the hope that diplomatic efforts will work can cause delays and allow the suppressor to carry out its genocidal action.[507]

Finally, the most important criticism is again concerned with the "reasonable chance of success". In ethnic conflicts, success is the ending of violence and the (re-)construction of a peaceful, multiethnic society, namely the organized coexistence of ethnic groups that have just gone through traumatic violence. Thus, success requires outsiders to make some extremely difficult choices: how and when to intervene, to implement reconstruction efforts, and to decide between reconciliation efforts and punishment of the guilty (see below).[508] The fact that much ethnic violence is carried out more quickly than intervention forces can be deployed is in itself no excuse for UN failure to intervene – some lives can even be saved by

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[504] There is little doubt that Kosovars were mistreated and more often the victims of Serbs than contrary, but there were some abuses against Serbs by Kosovar Albanians. Charges against members of the Kosovo Liberation Army by the ICTY emphasize this point.

[505] In Rwanda, for instance, it was only recently discovered that a large part of killed people were moderate Hutu, not Tutsi. See the study by CHRISTIAN DAVENPORT and ALLAN STAM. "Mass Killing and the Oases of Humanity: Understanding Rwandan Genocide and Resistance." Published on http://www.genodynamics.com/.

[506] The immediate response to the NATO bombing campaign in Kosovo was the massive expulsion of Kosovar Albanians.

[507] A very good example is the Rwandan case: the strategy of the UN – transparency, diplomacy, and non-intervention – helped the Hutu extremists to plan and execute the genocide.

[508] See also HOFFMANN, Debate about Intervention, 277-281.

a belated intervention.[509] However, this means that the benefits of humanitarian intervention might be much smaller than realized.

These considerations lead to the conclusion that the states and international organizations concerned should prepare adequately for intervention in situations that qualify as genocide or gross human rights violations. The UN should be equipped with a rapid reaction force in order to eliminate problems of command and commitment that have plagued previous efforts.

Furthermore, the question of when a situation qualifies as a "gross human rights violation" or "genocide" in which the international community is obligated to react is difficult to define. Neither the UN Charter nor general international norms, treaties, and other documents provide a clear answer to this question.

4.2.3 Negotiations and Written Agreements

As seen above, human rights should be part of the concerns of negotiators. Sustainable and long-term prevention of armed conflict must include a focus on strengthening respect for human rights and addressing core issues of human rights violations, wherever these occur. However, the negotiator's priority must be to end violence and suggest solutions such as power-sharing to the conflict. Post-conflict objectives have to be met: (1) stopping violence and ending human rights violations so that the victims can feel physically safe; (2) coming to terms with the past accurately and completely; (3) bringing justice; (4) creating conditions that make it possible for the society to move forward; (5) and achieving reconciliation and coexistence between former perpetrators and those with whom they were in conflict.[510]

The key aspect of the negotiation process is characterized by bargaining, a process consisting of six steps: (1) each party makes an initial offer to the other party; (2)

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[509] ALAN KUPERMAN speaks of "Killers are quicker than interveners." See ALAN J. KUPERMAN. "Humanitarian Hazard: Revisiting Doctrines of Intervention." *Harvard International Review* 26/1 (Spring 2004): http://hir.harvard.edu/articles/1219/.

[510] See ELLEN LUTZ. "Troubleshooting Differences." *Human Rights Dialogue* 2/7 (Winter 2002): 23/24.

commitments are made to a certain extent addressing specific problems to keep the process going; (3) promises of rewards and threats of sanctions are issued to induce the other party to make concessions; (4) concessions are made if the parties' views move closer together; (5) retractions of previous offers and concessions are made if parties if the parties draw apart; and finally, (6) if the dynamics of making concessions outweigh the dynamics to find unilateral solutions, parties move towards an agreement that is located somewhere between their opening offers.[511]

A very successful tactic in this context is mediation, the purpose of which is to bring a settlement to a conflict that is acceptable for both sides and consistent with the third party's interests. It is a political process in which parties do not commit to accept the third party's ideas (contrary to arbitration, for example). Rather, it is a form of negotiation in which a third party assists the conflicting parties in finding a solution for the issues at stake. Mediation facilitates the settlement of disputes that parties would not have otherwise been able to accomplish on their own.[512] Parties have a three way choice: they can accept the agreement, continue to bargain in the hope to obtain better terms, or break off negotiations.[513]

Negotiation outcomes can be evaluated according to four criteria:[514]

- *Agreement:* The first and most obvious criterion is if parties reach agreement or not.
- *Efficiency*: The second factor looks at the extent to which parties were able to reach the best possible agreement at the lowest costs (end of violence and human suffering, time, financial costs, reputation etc.) for a given situation.
- *Equity:* Equity refers to the degree to which the parties consider an agreement to be "fair" and "equitable". Fairness is a subjective concept, but some objective factors

[511] See P. TERRENCE HOPMANN. "Bargaining and Problem Solving: Two Perspectives on International Negotiation." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, 445-468. Washington, D.C.: United States Institute of Peace Press, 2001. 446.

[512] See for an overview of mediation practice by states and international actors SAADIA TOUVAL and I. WILLIAM ZARTMAN. "International Mediation in the Post-Cold War Era." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, 427-443. Washington, D.C.: United States Institute of Peace Press, 2001.

[513] See more detailed CHARLES IKLÉ. *How Nations Negotiate.* New York, NY: Frederick A. Praeger, 1964. 59-61.

[514] Adapted from P. TERRENCE HOPMANN. *The Negotiation Process and the Resolution of International Conflict.* Columbia, SC: University of South Carolina Press, 1996. 28-30.

can be specified; the agreement should be non-discriminatory and equitable and reciprocal in the sense that all parties benefit/loose equally from the agreement.

- *Stability*: This refers to the durability of the agreement over time. An agreement is most stable if the parties have an interest in the full implementation of the terms of the agreement. This can be achieved if the agreement is to the benefit of all parties, if appropriate incentives for the parties are offered (e.g., suspension of sanction regimes or membership in an international or regional organization[515]), and if international actors or mediators involved in the negotiation process are supervising and guaranteeing the implementation process.

The involvement of all parties in negotiations thus induces a complex, multiparty negotiation process that is very significant for the stability and long-term outcome of the peace process. Such negotiations are complicated and depend on the capacity of community leaders to collaborate, recognize opportunities, and avoid "traps" of polarization and unilateral ways. Enduring peace needs skills, talents, and commitment not only from the conflicting parties themselves, but also from international players and states, mediators, officials, and humanitarian actors.[516] Persuasion, backed by diplomatic, economic, and even military "carrots and sticks" available to the international community, can be a powerful weapon.[517]

Peace and confidence building require that human rights and the rule of law be implemented in order for the settlement to survive. The difficulty is to find a balance between promoting peace and implementing human rights. ROLAND PARIS writes: "What is needed in the immediate post-conflict period is not quick elections, democratic ferment, or economic 'shock therapy' but a more gradual approach to liberalization, combined with the

[515] Like it is done by the EU: prospective member states have to fulfill a set of basic democratic, economic, and human rights and rule of law-related standards before the EU considers negotiations for membership.

[516] See the analysis by CHESTER A. CROCKER, FEN OSLER HAMPSON, and PAMELA AALL. "Is More Better? The Pros and Cons of Multiparty Negotiations." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, 497-513. Washington, D.C.: United States Institute of Peace Press, 2001.

[517] HANNUM, Human Rights and Conflict Resolution, 50.

immediate building of governmental institutions that can manage these political and economic reforms."[518] STEPHEN J. STEDMAN states:

> [P]riority should be given to the demobilization of soldiers and the demilitarization of politics; that is, the transformation of soldiers into civilians and warring armies into political parties. The achievement of important normative goals such as the protection of human rights and creation of accountability and democracy depend on these transformations.[519]

This means that political change and the implementation of human rights are interdependent. In facilitating a peace agreement, UN negotiators should be sure not to undermine human rights norms. In the best case, they should consider the recommendations of the UN treaty bodies to address specific practices and make sure that human rights norms are interpreted the same way throughout the UN.[520] In countries where the violation of human rights is central to the conflict itself, the correction of those violations may lead the way to the resolution of the conflict. Peace agreements that address immediate post-conflict situations (including disarmament, demobilization, and reintegration of combatants) should include funding for human rights-capacity building. These capacity-building efforts must be directed towards the (transitional) government as well as the civil society. Even if the implementation is imperfect, UN mediators must inform officials in any post-conflict power-sharing government that their responsibilities extend beyond adopting some form of democracy, and that it is the international obligation of the state to promote human rights.[521]

Implementation of human rights standards does not mean looking only at violations; it means improving the human rights situation of all people living in the country. A country in which UN human rights standards have not been met before a violent conflict cannot be expected to achieve the standards right after the signing of a peace agreement. In almost every country emerging from violence, the degree to which human rights are protected depends on the post-conflict situation and international assistance. Compliance with human and minority rights standards does not need to be implemented immediately, but can be

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[518] ROLAND PARIS. *At War's End: Building Peace After Civil Conflict*. Cambridge: Cambridge University Press, 2004. 7/8.

[519] See STEPHEN J. STEDMAN. "Introduction." In *Ending Civil Wars: The Implementation of Peace Agreements*, ed. Stephen J. Stedman, Donald Rothchild, and Elizabeth M. Cousens, 1-40. Boulder, CO: Lynne Rienner, 2002. 3.

[520] See *Negotiating Justice? Human Rights and Peace Agreements*, ed. International Council on Human Rights Policy. Vernier: ATAR, 2006.

[521] HANNUM, Human Rights and Conflict Resolution, 52/53.

viewed as part of the peace process as a whole. The Council of Europe, for example, did not demand immediate compliance of post-Soviet states to become parties to the European Convention on Human Rights.

A survey conducted by HURST HANNUM[522] examined the role of human rights in peace agreements after intrastate warfare. The study included 70 peace agreements in 29 countries.[523] 19 of these agreements were comprehensive settlements as opposed to more narrow settlements dealing with disarmament or other technical issues in which no reference to human rights would be expected.[524] Of these, 18 include references to human rights, with varying degrees of commitments, specificity, and different institutional structures.[525] There was substantial involvement of the UN in approximately half of the negotiations that led to the agreements.[526] However, there seems to be no correlation between UN involvement and the inclusion of human rights clauses in the agreement. Furthermore, there is only a weak correlation between the inclusion of human rights norms and the success of the peace agreement. TONYA PUTNAM, who considers 16 peace agreements,[527] observes that only three of the six successful cases included human rights provisions. She concludes:

> The absence of explicit human rights provisions in a peace settlement in no way inhibits their incorporation into subsequent laws or constitutions. Therefore, the positive utility of pressing to include such provisions in a settlement instrument should be approached in each new context as an open question – not as a starting assumption.[528]

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[522] Ibid., 43-50.

[523] The states include Angola, Burundi, Côte d'Ivoire, Democratic Republic of the Congo, Guinea-Bissau, Liberia, Republic of Congo, Sierra Leone, Somalia, Sudan, Mozambique, Bosnia and Herzegovina, Croatia, Serbia and Montenegro (Kosovo), Macedonia, United Kingdom (Northern Ireland), Mexico (Chiapas), Colombia, El Salvador, Guatemala, Iraq, Indonesia (Aceh), Afghanistan, Papua New Guinea (Bougainville), Cambodia, Georgia, Philippines (Mindanao), Sri Lanka, and Tajikistan.

[524] The nineteen agreements include in chronological order: Cambodia (1991), El Salvador (1991), Mozambique (1992), Angola (1994), Bosnia and Herzegovina (1995), Croatia (1995), Guatemala (1994-96), Mexico (1996), Tajikistan (1997), Northern Ireland (1998), Philippines (1998), Sierra Leone (1999), Macedonia (1999), Burundi (2000), Bougainville (2001), Afghanistan (2001), Sudan (2002 and 2004), Côte d'Ivoire (2003), and Liberia (2003).

[525] The only exception is the agreement reached in Tajikistan, which did include references to refugees and elections.

[526] Afghanistan, Angola, Bougainville, Burundi, Cambodia, Croatia, Guatemala, Liberia, Mozambique, Sierra Leone, Sudan, and Tajikistan.

[527] The agreements include Angola, Bosnia and Herzegovina, El Salvador, Cambodia, Guatemala, Lebanon, Liberia, Mozambique, Namibia, Nicaragua, Rwanda, Sierra Leone, Somalia, Sri Lanka, and Zimbabwe. See PUTNAM, Human Rights and Sustainable Peace, 261/262.

[528] Ibid., 260.

Nevertheless, a study that examined civil wars between 1940 and 1992 found that "negotiated settlements that appear to have all elements of success – a ceasefire agreement, specific arrangements for future governance, resolution of underlying issues – still fail if they lack the guarantees necessary to reassure groups to proceed with implementation."[529] Human rights provisions play an important role in reassuring groups. An OHCHR official identifies at least three contributions that human rights provisions might make to sustainable peace.[530]

First, public recognition of human rights can contribute to an important symbolic "sense of justice" in the population at large. This might facilitate discussion of human rights-related post-conflict matters such as accountability, reconciliation, and the establishment of war crimes tribunals on the national or international level.

Second, human rights provisions that are specifically directed towards the inclusion or integration of ethnic groups and minorities into any new political structure can contribute to more stable and successful agreements, especially if ethnicity was the most important factor in the conflict.

Third, such provisions may serve as vehicles for other parts of the society that may not have taken part in the hostilities to participate in the peace process. This is especially true for women whose participation can lead to a more congenial atmosphere for reconciliation than would be found among the former, mostly male adversaries.[531] Human rights provisions may also encourage the development of civil society by stimulating discussion among the population.

In sum, research demonstrates that there is no evidence that including human rights provisions in peace agreements makes it more difficult to reach or implement an agreement. However, there is little evidence that human rights provisions *per se*, meaning without significant international contribution to monitoring and capacity building or institutional change, make an agreement or its implementation easier or more successful in the short term.[532] Even if the positive value of including human rights provisions in peace agreements

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[529] WALTER, Committing to Peace, 166.
[530] Cited in HANNUM, Human Rights and Conflict Resolution, 46.
[531] See for example "Women and Armed Conflict." Fact Sheet No. 5, UN Conference on Gender Equality, Development and Peace for the 21st Century, New York, 2000. See also the Reports of the Secretary-General on "Women and Peace and Security, UN Doc. S/2004/814, and "Women, Peace and Security", UN Doc. S/2002/1154.
[532] See HANNUM, Rethinking Self-Determination, 46/47.

cannot be proved, it is clear that human rights are one of the most important pillars of the United Nation's quest for a just and peaceful world.[533]

Given the fact that the promotion of human rights is one of the UN's goals, it seems logical to conclude that human rights should be integrated in negotiations, written agreements, and constitutions fostered by the UN. In the words of UNSG KOFI ANNAN: "We will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights."[534]

4.2.4 Post-Conflict Reconstruction

Some of the issues addressed in previous chapters already touched upon basic concepts of post-conflict reconstruction. The term "post-conflict" is in some ways misleading, because a conflict does not end with the signing of a peace agreement. In the best case, peace agreements provide the framework for negotiation, bargaining, and the accommodation of claims by other than violent means. "Reconstruction" is also misleading as its aim is to create new institutions and preclude the re-building of old structures that led to violent conflict in the first place. Nevertheless, the term "post-conflict reconstruction" will be used here as it is the most commonly used term to describe the process of building a society, institutions, and a legal framework after violent ethnic conflict. In contrast to conflict management, post-conflict reconstruction is aimed at creating institutions and procedures necessary to permanently settle the conflict and implement the provision of a peace agreement. Post-conflict reconstruction is thus seen increasingly as an integral part of the conflict resolution processes.

Protracted ethnic conflicts shape societies in many ways, often resulting in a lack of functioning and legitimate institutions, weak economic performance, non-existent or

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[533] *Strengthening of the United Nations System: An Agenda for Further Change*, Report of the Secretary-General, UN Doc. A/57/387 (2002), paragraph 45: "The promotion and protection of human rights is a bedrock requirement for the realization of the Charter's vision of a just and peaceful world."

[534] See *In Larger Freedom: Towards Development, Security, and Human Rights for All*, Report of the Secretary-General, UN Doc. A/59/2005.

polarized structures of civil society, and antagonized elites. Once a peace agreement has been signed and a ceasefire has been established, projects should be started aiming at the transition from war to peace, democracy, an open market economy, and a system based on the rule of law. This involves building accountable, credible, and transparent institutions, generating self-sustaining economies, and creating a civil society in which people learn to live with their troubled past in order to maintain peace. [535] Post-conflict reconstruction is a tremendous task, posing many difficulties and problems.

The dilemma faced by international post-conflict reconstruction efforts is that in the short run, it is easiest and most cost-effective for the international community to bring in outside expertise and set up the new structures of the war-affected country. In the long run however, this approach fails to create local capacity to hold up the new structures and makes the communities dependent on outside supervision. In the worst case, this can lead to the reemergence of conflict. In addition, it is almost as impossible to build a democratic society by authoritarian means, as it is to build a sustainable economy by humanitarian aid alone.[536] The case of Bosnia and Herzegovina with its continued dependency on the EUFOR (and former SFOR) and the EU High Representative in Bosnia and Herzegovina illustrates this dilemma of an "artificial" peace. Despite high level international efforts, economic aid, and assistance with the transformation of government, many post-conflict reconstruction processes lead to peace that is dependent on the presence of foreign troops, an economy relying on foreign aid, and segregated societies in which former enemies are not reconciled. Sustainable success in post-conflict reconstruction depends on the establishment of stable and effective institutions before elections can be held or economic activity can become self-sustaining.[537]

GEORGE DOWNS and STEPHEN J. STEDMAN[538] developed eight factors that can make the implementation of peace agreements more difficult:

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[535] See for a more detailed argument WOLFF, 157/158.
[536] Ibid., 162.
[537] See BENJAMIN REILLY. *Democracy in Divided Societies: Electoral Engineering for Conflict Management.* Cambridge: Cambridge University Press, 2001. 3-26.
[538] See GEORGE DOWNS and STEPHEN J. STEDMAN. "Evaluation Issues in Peace Implementation." In *Ending Civil Wars: The Implementation of Peace Agreements*, ed. Stephen J. Stedman, Donald Rothchild, and Elizabeth M. Cousens, 43-69. Boulder, CO: Lynne Rienner, 2002. 55-57.

- *Number of conflicting parties*. The difficulty of implementing an agreement increases if there are more than two conflicting parties as strategies become less predictable, balances of power more fragile, and alliances more fluid. One of the major issues in situations involving more than two parties is the difficulty of addressing all concerns of all conflicting fractions. However, in cases in which not all parties were included in negotiations, the peace agreement was more likely to fail and the use of violence by excluded parties was common.[539]
- *The absence of a peace agreement signed by all parties in the conflict before intervention*. UN involvement in post-conflict situations usually requires a detailed peace agreement and consent to a peace mission among the factions of the conflict. However, there have been some cases since the early 1990s in which the UN and/or regional organizations intervened in ongoing wars in the hope of using force to compel a peace agreement.[540] In some cases, intervention in the absence of a peace agreement can lead to violent opposition by the parties and thus contribute to the escalation of conflict. Furthermore, a situation without a peace agreement implies a lack of possibilities to implement means accompanying mediation and negotiation efforts such as confidence-building and problem solving.
- *The likelihood of spoilers*. The presence of spoilers who disturb the peace process poses huge challenges to implementation. The problem with spoilers is that they are usually only identified after the implementation process is completed. As a result, the prevention of spoilers or action against spoilers during the implementation process are extremely difficult. The extent to which an actor actually engages in spoiling behavior depends on the existence of opportunities.[541]
- *Collapsed states*. The lack of some basic political, economic, and social infrastructure and institutions complicate the implementation of peace agreements. The implementers, in most cases the international community under the leadership of the

[539] See for example the conflict in Northern Ireland: Only the 1998 Good Friday Agreement was successful in securing an enduring peace. See KEMPIN, Ready for Peace.

[540] Examples include the UN mission in Somalia, ECOMOG in Liberia and Sierra Leone, India in Sri Lanka, Syria in Lebanon, and the NATO in Bosnia and Kosovo.

[541] On spoiler problems see STEPHEN J. STEDMAN. "Spoiler Problems in Peace Processes." *International Security* 22/2 (Fall 1997): 5-53.

UN, do not only have to put an end to violence, but also build up governing capacity in order for peace to have a sustainable chance.

- *Number of soldiers*. Higher number of soldiers or rebels pose greater demands for verification and monitoring and require more personnel and resources to supervise the monitoring and demobilization processes.
- *Disposable natural resources*. If the conflicting parties have access to disposable resources such as gems, minerals, oil, or timber, the implementation processes become more difficult as they provide armies with the means for continued fighting.
- *Hostile neighboring states or networks*. Civil wars usually take place in unstable domestic and regional conditions with neighboring states being affected and accordingly playing a key role in undermining or supporting the opportunities for peace. Ethnic kin, diasporas, and national interests of neighboring states are complicating factors in peace processes.[542]
- *Secessionist movements*. If the issue at stake is secession and independence, negotiated settlements aiming at keeping the state together are more difficult to negotiate and implement. As seen above, secessionist conflicts involve all or nothing-struggles that are not open for compromises.

The more these indicators are present, the more difficult the ending of violence and the implementation of a peace agreement becomes. Furthermore, international commitment is crucial; low degrees of interest and willingness lead to a lack of intervention or interventions with constrained resources, limited mandates, and weak effects. If a UN peace mission is supported by large, powerful states, an intervention is more likely to be successful. The level of interest also affects the supply of resources and soldiers assigned to a given mission.[543]

On the political level, the most important task is to restore law and order, to establish an independent judiciary, and to hold elections. Especially in situations involving ethnic issues, it is crucial that the institutions established are appropriate for the particular conflict and do

[542] The influence of spoilers to a peace process is stronger if they can rely on neighboring states for resources (guns, capital, fuel etc.) and sanctuary. Ibid., 51.
[543] See for a detailed analysis DOWNS and STEDMAN, Evaluating Issues in Peace Implementation, 58-65.

not deepen the polarization between communities (e.g., by allowing "ethnic" voting or the lack of provisions for power-sharing etc.).

The UN is one of the major actors, usually coordinating efforts by different UN agencies and departments, NGOs, and national efforts. The UN plays an important role in post-conflict situations, especially in promoting democracy. The UNGA has adopted several pro-democracy resolutions, especially in the mid-1990s.[544] In the long run, democracy will be a more effective guard against ethnic conflict than the presence of foreign troops.[545] The problem is however, that post-conflict situations do not usually provide for the basic conditions of a democratic society, namely legitimate institutions, a strong civil society and a political culture for dealing peacefully with problems, and the economic conditions to sustain both institutions and civil society.

A domestic order, established on the basis of democratic principles and the rule of law, must fulfill some minimum standards. These include: a representative elected government that is acting in compliance with the constitution and the law, a clear separation between the state and political parties, accountability of security forces to civilian authorities, consideration and adoption of legislation by public procedure, an independent judiciary, compensation for victims of crimes committed during the conflict, free and fair elections at regular intervals, and comprehensive and effective rights for participation of all citizens of the state.[546]

UN election assistance has become an essential preventive and reconstructive measure to diminish the risk for ethnic conflict and to manage the claims of ethnic minorities. Electoral assistance is thus a part of most mandates for peacekeeping operations. The UN Electoral Assistance Division, established in April 1992 as a division of the DPA, is responsible for the coordination of the activities of the United Nations system in the field of electoral assistance. It provides for monitoring of elections, technical assistance, and the supervision of the organization of the elections.

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[544] See for example UNGA Resolution 46/137 (1991), Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, UN Doc. A/RES/46/137 (1991).

[545] WOLFF, Ethnic Conflict, 175.

[546] See more detailed NEIL J. KRITZ. "The Rule of Law in the Postconflict Phase." In *Turbulent Peace: The Challenges of Managing International Conflict*, ed. Chester A. Crocker, Fen Osler Hampson, and Pamela Aall, 801-820. Washington, D.C.: United States Institute of Peace Press, 2001. 804.

Elections in post-conflict situations carry a tremendous burden. They are called upon to settle the issues of internal and external legitimacy and must be organized under the difficult circumstances of societal disorder, general insecurity, and institutional breakdown – conditions that seldom favor the transition to democracy. Furthermore, they are sometimes designed to advance contradictory goals, including the establishment of a peaceful society, democratization, and compliance with internationally monitored peace agreements. If the major goal of the election is democratization, for example, the necessary institutions have to be in place as described above. In other cases, the nature of the conflict and the peace agreement require quick elections in an atmosphere in which leaders continue to gain power through the use of military force or if the international community is not willing or able to provide troops for a long-term peace mission.[547]

The organization of free and fair elections as a means to introduce democracy is not enough and reliance on it can be self-defeating. They should be accompanied by other efforts of peace implementation such as putting an end to violence, demobilization, establishing the rule of law, institution and capacity building, refugee repatriation, the promotion of human rights, and the implementation of the provisions of a peace agreement. Ethnic groups that recently fought in conflict fear that the winner of elections will set up authoritarian rule, exclude opposition and minorities, and imprison members who took part in the armed attacks. As a result, they refuse to participate in negotiations and may choose to continue to accomplish their claims using violent means.[548] International actors have to understand that liberal democracy cannot be coerced on a society and that the onset of a democratic process in a war torn society needs some form of transition or interim solution.

More comprehensively, UN missions can be provided with post-conflict reconstruction mandates that take over government functions. Cases include East Timor, Kosovo, and Eastern Slavonia.

In the case of East Timor, after years of external rule (Portuguese colony until 1974, Indonesian province 1975-1999) and struggle for self-determination, the people in East

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[547] See TERRENCE LYONS. "The Role of Postsettlement Elections." In *Ending Civil Wars: The Implementation of Peace Agreements*, ed. Stephen J. Stedman, Donald Rothchild, and Elizabeth M. Cousens, 215-235. Boulder, CO: Lynne Rienner, 2002. 215-217.

[548] WALTER, Designing Transitions from Civil War, 155.

Timor voted for independence in a referendum held on August 30, 1999. The process was accompanied by serious violence and human rights violations that could only be stopped by an Australian-led and UNSC authorized international intervention. In the aftermath, the UNSC set up the UN Transitional Administration in East Timor (UNTAET)[549] to assist the country in the process of implementing its independence. The transitional government was established for three years and had all functions of a government. These included the tasks of providing security and maintaining law and order, administrative functions, the creation of local capacity for self-government and civil services, providing humanitarian and development assistance, and laying the basis for a self-sustaining economy.[550]

The UN Transitional Administration in Eastern Slavonia (UNTAES)[551] was a relatively short-lived mission between 1996 and 1998, aiming at the reintegration of three Serbian-dominated regions into Croatia.

The UN Interim Administration Mission in Kosovo (UNMIK) was established in 1999 by UNSC Resolution 1244[552] and had the task of performing basic civilian administrative functions, promoting the establishment of autonomy and self-government, facilitating a process to determine Kosovo's future status, coordinating international relief efforts, supporting the reconstruction of infrastructure, maintaining law and order, promoting human rights, and assuring the safe return of refugees and internally displaced persons.[553] To perform these tasks, the mission combined civilian and military elements and involved several international organizations under the leadership of the UN, the OSCE, and the EU.[554]

These examples illustrate that the essential aim of post-conflict reconstruction is to create a set of political and social structures that allow the country, in accordance with the agreed settlement, to start a transformation process in which peaceful and non-violent political institutions are established. The task is multi-dimensional and needs short-term as

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[549] UNSC Resolution 1272 (1999), UN Doc S/RES/1272 of 22 October 1999.
[550] See the mandate of UNTAET: http://www.un.org/peace/etimor/UntaetM.htm.
[551] Established by the UNSC Resolution 1145 (1997), UN Doc. S/RES/1145 of 19 December 1997.
[552] UNSC Resolution 1244 (1999), UN Doc S/Res/1244 of 10 June 1999.
[553] See the mandate of UNMIK http://www.unmikonline.org/intro.htm.
[554] The mission is organized in "pillars":
Pillar I: Police and Justice, under the direct leadership of the UN;
Pillar II: Civil Administration, under the direct leadership of the UN;
Pillar III: Democratization and Institution Building, led by the OSCE;
Pillar IV: Reconstruction and Economic Development, led by the EU.

well as long-term approaches. In the short run, ceasefire agreements are usually the first step, as they end violence and establish the necessary conditions for negotiating a peace agreement. Building on these preliminary conditions, post-conflict reconstruction efforts aim at maintaining basic security. Without these preconditions of basic security, it is very difficult to implement any follow-up tasks.[555] In the long run, the task is the establishment of legitimate, stable, and effective political institutions, creating conditions for economic sustainability, and transforming the war-affected society into a functioning civil society with respect for human rights and peaceful co-existence.

Peace implementation in post-conflict societies with a focus on human rights is a great challenge and so far, has not been very successful. PUTNAM writes: "The heart of the problem is the apparent failure of many international human rights organizations … to recognize that effective promotion and protection of human rights early in post-conflict settings requires different tactics than those typically applied in response to human rights abuses occurring in stable societies."[556]

In stable societies, human rights organizations have been successful by calling international attention to violations of human rights ("naming and shaming") and pushing governments to act against the violator. In cases of relatively stable societies, individual accountability and redress for violations has been advocated by human rights organizations.[557] However, in post-conflict situations the required features such as an independent judiciary, a civilian controlled police force, and necessary political institutions are mostly absent or in a very early stage of development. As a result, human rights protection in conflict situations needs a different approach. Standardized action, as it is taken in countries with stable societies, is not sufficient to deal with a post-conflict situation. It can endanger the peace process as a whole, as it does not take into account the sensitivity of peace negotiation.[558] Furthermore, the failures of international human rights organizations to take into account other tasks and priorities in peace negotiations can lead to isolation and abandonment of the human rights approach in the implementation process. A case by case

[555] As it is illustrated by the example of the conflict in Iraq: the deteriorating security situation makes it difficult for donors, international and non-governmental organizations to implement their projects.
[556] PUTNAM, Human Rights and Sustainable Peace, 237.
[557] PUTNAM refers to these legal and political tools as "enforcement approach." See Ibid., 238.
[558] See above.

approach when promoting, monitoring, and protecting human rights is thus needed in post-conflict situations, an approach determined for the overall goal of achieving peace.[559]

4.2.5 Accountability and Transitional Justice

Since the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda and the creation of the International Criminal Court (ICC), "transitional justice" has received significant attention. The relationship between international responses to conflict and judicial mechanisms goes back to the 1899 Hague Conference. The conference established the Permanent Court of Arbitration to settle dispute between states, a precedent for the PCIJ after World War One and the ICJ after World War Two. Individual accountability was established for the first time after the Second World War with the Nuremberg and Tokyo military tribunals. In the early 1990s, the UN established the ad hoc tribunals for prosecuting crimes in the former Yugoslavia and in Rwanda. The development towards accountability for individuals under international criminal law was topped by the establishment of the ICC in 2002. International human rights courts such as the European Court of Human Rights and the Inter-American Court of Human Rights play a role in dealing with ethnic conflict.

The establishment of accountability for past crimes is "one of the most difficult issues facing OHCHR and the broader human rights community," writes the deputy force commander of UNTAET in East Timor.[560] With the creation of the ICC and its investigations into crimes committed in the Democratic Republic of the Congo, Uganda, and in Darfour (Sudan), some responsibility for accountability may shift from the UN human rights bodies to the ICC. Until now 100 states have ratified the ICC statute, including states that have recently been subjected to wars such as Afghanistan, Sierra Leone, and Tajikistan.[561] The ICC can only deal with crimes that occurred after its statute entered into force on 1 July, 2002, and it is a complementary institution, meaning that national judicial

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[559] See PUTNAM, Human Rights and Sustainable Peace, 241.

[560] MICHAEL G. SMITH with MOREEN DEE. *Peacekeeping in East Timor: The Path to Independence.* Boulder, CO: Lynne Rienner, 2002. 116.

[561] For a full list of state parties see http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp

ways have to be exhausted or inoperable before the ICC obtains jurisdiction. The ICC issued its first indictment against five members of the Ugandan Lord's Resistance Army (LRA) for war crimes and crimes against humanity in October 2005.[562] There is the hope that existing international and mixed criminal tribunals and the ICC have a deterrent effect.

Many UN mediators equate a human rights approach with "transitional justice".[563] A UN report of 2004 defines "transitional justice":

> as the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.[564]

According to the International Center for Transitional Justice "approaches to transitional justice comprise five key elements: prosecuting perpetrators, documenting and acknowledging violations through non-judicial means such as truth commissions, reforming abusive institutions, providing reparations to victims, and facilitating reconciliation processes."[565]

One aspect of transitional justice is the establishment of the rule of law. The UNSG defines rule of law:

> The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness and application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitraries and procedural and legal transparency.[566]

Human rights capacity-building is an integral part of the rule of law. Among the rule of law issues that should be addressed by the UN human rights bodies and especially by the

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[562] See Warrant of Arrest Unsealed against Five LRA Commanders, ICC Press Release, 14 October 2005, ICC-20051014-110-en.
[563] See the statements in HANNUM, Human Rights and Conflict Resolution, 36.
[564] Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc. S/2004/616 (2004), paragraph 8.
[565] See http://www.ictj.org/en/about/mission/
[566] Report of the Secretary-General on the Rule of Law and Transitional Justice, paragraph 6.

OHCHR are standards for the independence of the judiciary, fair trial norms, access to justice for all parts of the population, including members of minority groups, and the protection of human rights defenders. The UN human rights bodies might also provide advice on law reform projects, such as removing discriminatory provisions from existing statutes and ensuring that transitional regulations are consistent with international human rights norms. [567] The broad scope of transitional justice requires cooperation between different UN bodies.

The question of whether accountability is the best strategy to address atrocities committed in an ethnic conflict has led to much debate. Particularly when all sides of the conflicting parties have committed human and minority rights violations, amnesty seems to be an obvious solution. However, public exposure of human rights violations and "threatening" government officials with later prosecution for international crimes if human rights are not respected may reassure the public in a war-torn society that there will be justice for the crimes committed and may be a way of influencing government behavior.

Until recently, no consistent UN approach to accountability could be established. Becoming more and more uncomfortable with the situation of impunity for even the most horrific crimes, the UN developed guidelines in 1999 as an informal document. The most important guideline reads: "United Nations-endorsed peace agreements can never promise amnesties for genocide, war crimes, crimes against humanity, or gross violations of human rights."[568] Thus, the UN will not lend its approval to impunity for international crimes, even if the parties of the conflict wish to do so. It is on the basis of these guidelines that the UN rejected the amnesty included in the 1999 Lomé Agreement in Sierra Leone.[569] In other words, "[t]he question … can never be whether to pursue justice and accountability, but rather when and how."[570]

In some cases, accountability can be an obstacle to peace and reconciliation. In the words of the UN Secretary-General:

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[567] See HANNUM, Human Rights and Conflict Resolution, 42.
[568] Report of the Secretary-General on the Rule of Law and Transitional Justice, paragraph 10.
[569] *Peace Agreement Between the Government of Sierra Leone and the Revolutionary Front of Sierra Leone*, 7 July 1999, Article 9.
[570] Report of the Secretary-General on the Rule of Law and Transitional Justice, paragraph 21.

> Ending the climate of impunity is vital to restoring public confidence and building international support to implement peace agreements. … We know that there cannot be real peace without justice. Yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times, and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult, or even impossible, to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive.
>
> But equally, if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents. [571]

There are no easy answers to such moral, legal and philosophical dilemmas.

It is doubtful that sustainable peace can be established without addressing accountability, past crimes, and human rights issues in general. The issue of transitional justice and the establishment of democracy and the rule of law are strongly connected with human rights norms, such as the right to political participation, economic, social, and cultural rights as well as the prohibition of discrimination. But protecting human rights goes beyond merely punishing perpetrators. Suppression of minorities, discrimination, and even politically motivated detention are not internationally punishable crimes, but their continuation in a post-settlement situation will undermine the chances for a stable peace. The Report of the UNSG on the Rule of Law and Transitional Justice states:

> Our experience in the past decade has demonstrated clearly that the consolidation of peace in the imminent post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration for justice.[572]

Moreover, it would be dangerous to unite the international responsibility of states to protect human rights with the criminal liability of individuals who committed crimes under international law.[573]

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[571] Secretary-General Expresses Hope for New Security Council Commitment to Place Justice, Rule of Law at Heart of Efforts to Rebuild War-Torn Countries, UN Press Release SG/SM/8892, 24 September 2003.
[572] Report of the Secretary-General on the Rule of Law and Transitional Justice, paragraph 2.
[573] HANNUM, Human Rights and Conflict Resolution, 40.

4.3 Conclusion

The UN combines two great strengths when addressing conflict resolution and human rights. One is its unique legitimacy as authorizer of actions in the name of the international community. The second is its network of agencies, which provide it with the knowledge and institutional capacity to cope with humanitarian, political, and economic tasks. However, there are also limits to UN capacity, especially in cases in which the UN pursues coercive strategies and/or comprehensive peace operations.[574] The proliferation of mediators, NGOs, humanitarian agencies, regional and local actors, the prevalence of political competition among major powers in the UNSC, and the weakened authority of the UN have constrained the UN in taking over the role it was build for – to restore and maintain international peace and security and secure respect and promotion of human rights. UN engagement shows two major problems: organizational weaknesses and insufficient commitments.

First, the UN's structural organization affects its preventive policies and the ability for effective action in ethnic conflict. The bureaucratic structure of many organizations is a serious impediment to rapid and flexible responses. Inter-agency rivalry results in preoccupation with carving out territories and resistance to effective policy coordination. A further problem is the fact that the emphasis on generally applicable rules makes international organizations unsuited to developing policies for specific situations.[575]

As seen above, its reaction mechanisms are slow and complicated, while UN peace operations are ill-equipped with badly trained and slow-moving troops. Furthermore, UNSC resolutions are often formulated in an imprecise and weak manner and lack clear objectives and rules of engagement. Problems of communication between the UNSC, the Secretariat, the UNGA, other UN agencies, the governments of troop-contributing countries, and other actors such as NGOs in the field have led to major impasses in the past.

Second, the lack of political will has led to weak commitments, thus sending ambiguous messages to the parties in conflict. The UN makes "paper-threats" while lacking the ability or will to carry them out. Moreover, a culture of "no blame" exists in larger organizations

[574] BRUCE W. JENTLESON. "Preventive Diplomacy and Ethnic Conflict: Possible, Difficult, Necessary." In *The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation*, ed. David A. Lake and Donald Rothchild, 293-316. Princeton, NJ: Princeton University Press, 1998. 312.

[575] See more detailed MICHAEL N. BARNETT and MARTHA FINNEMORE. "The Politics, Power, and Pathologies of International Organizations." *International Organization* 53/4 (Autumn 1999): 699-732.

like the UN, meaning that responsibility is not assigned to the bodies and states involved. This results in a lack of post-case assessment and a failure to review policies and actions, which are particularly important for the development of effective conflict prevention strategies. Records of action taken and the assessment of successes and failures are crucial to the development of such strategies.[576] The UN is eroding its own credibility.

Although many criticisms are justified, most responsibility rests not with the UN as an institution but with the failure of the member states to provide the political will and the resources to react effectively to challenges. It is hardly reasonable for states to deny UN funding and then blame the UN for the failures due to the lack of resources. Nor is it reasonable to blame the UN as an institution for the failures of the member states of the UNSC to provide decisive leadership. However, some criticism is justified. There is a need for: a higher profile within the UN system for reaction mechanisms to ethnic conflict, better coordination of the different actors (the UN agencies, the states, NGOs as well as regional efforts), and an efficient and effective body dealing with minority issues and ethnic conflict.

Reaction mechanisms and the lack of a human rights focus. Conflict prevention strategies are relatively weak within the UN. Despite the fact that the costs of preventive approaches are low compared to other strategies such as peacekeeping missions or coercive measures requiring military means, and despite major successes on the regional level, especially within the OSCE framework, the UN devotes relatively few means to conflict prevention. Preventive diplomacy and mediation/negotiation are fields that hold great potential for UN action. As seen above, the UN has established great expertise in this area and possesses high credibility. There is a need for the UN to upgrade its capacity to offer preventive diplomacy and "good offices", especially within the UN Secretariat.

Peace operations lie at the intersection of the UN's political, security-related agenda, its efforts in economic, social, and cultural development, and its human rights activities. This gives the UN the opportunity to play a role in both fields and to draw from knowledge that

[576] RENATE DWAN. "Divisions of labour between international, regional and subregional organizations." In *Preventing Violent Conflict: The Search for Political Will,* ed. SIPRI, 37-44. Stockholm: SIPRI, 2000. 39.

originate from different backgrounds.[577] The risk is however, that these operations are too large in their scope. To combine all these activities, peace operations cannot clearly be assigned to one UN department and need to have inputs from various departments. This leads to a complication of the operation's organization and makes the communication between the different bodies more difficult. As a result, deployment becomes more complex and reaction slow. Furthermore, UN peace operations are in many cases provided with a limited or vague mandate, which lead to further deadlocks in the field. Clearer coordination and a more focused formulation of goals, scopes, and strategy of peace operations might help to overcome these impasses.

From a human rights point of view, human rights should play a more important role in the UN reaction mechanisms to conflict. As shown above, long lasting and stable peace can only be achieved if there is sufficient respect for human rights. Human rights play thus a major role in establishing stable and long-lasting peace, the most important goal of UN peace operations. However, on the human rights side, there is a lack of field experience among its activists in handling ethnic conflict. Many people working at the OCHCR have never been on a field mission and have no practical experience.[578] The same is more or less true for the UN treaty monitoring bodies – these are expert committees, which play an important role in developing international human rights law, but lack expertise in handling conflict situations. Given the fact that human rights and human rights violations are often at stake in conflicts, a rights-based approach in conflict situations should be strengthened.

Even though a human rights approach is mainly law-based, political analysis is essential. Human rights reports need to deal not only with violations of human rights but also with the social and political context of the abuses. Reports should include political analysis and policy recommendations.

Organizational dilemmas. The UN system is currently organized in a manner that does not effectively use information from its numerous human rights mechanisms to provide early warning to UN security and political organs. UN activities in the field of human rights are centered on norms and procedures that seldom reach all the relevant areas of policy making.

[577] See also EVANS, Cooperative Security and Intrastate Conflict, 13.
[578] See the statements in HANNUM, Human Rights and Conflict Resolution, 1-85.

For instance, the political bodies of the UN do not include the concluding observations of the treaty bodies in their actions. Even the Secretary General remarked that "the benefit of the current system [of human rights treaty bodies] is not always clear."[579] Furthermore, the concluding observations of the treaty bodies are not regularly submitted to the political bodies nor are the meetings observed by representatives from New York. Most of the time, even the OHCHR does not attend the meetings of the HCR.[580] Moreover, there is a geographical gap: the information gathered by the various UN human rights bodies in Geneva is not brought together in a focused way or transferred to the executive bodies based in New York.[581]

The problem is not only the coordination of information, but also the distribution of competencies among UN bodies and the quality of human rights reports. If reports are to play a greater role in decision-making within the UN in general, the conclusions and recommendations in reports must pay more attention to the political and social context of human rights violations.[582]

To overcome the information and coordination gaps, the UN formed the Interdepartmental Framework for Coordination Team, which includes members from different UN departments and agencies.[583] However, this team only operates at the lower level and hardly addresses coordination issues between the leadership and management level of UN bodies. To improve coordination and the effectiveness of the UN human rights and conflict resolution mechanisms, there needs to be coordination on the highest level to develop the best strategies for successful dealing with ethnic conflict and human rights issues.

No specific UN body is dealing with ethnic conflict and minority issues. Existing UN bodies and mandates have not yet appropriately covered important challenges facing ethnic groups and

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[579] Strengthening of the United Nations System, paragraph 52.

[580] HANNUM, Human Rights and Conflict Resolution, 35.

[581] See for an overview JOHN G. COCKELL. "Early warning analysis and policy planning in UN preventive action." In *Conflict Prevention: Path to Peace of Grand Illusion?*, ed. David Carment and Albrecht Schnabel, 182-206. Tokyo: United Nations University Press, 2003.

[582] DANILO TÜRK, Assistant Secretary-General for Political Affairs. DANILO TÜRK. "Mainstreaming Human Rights." *Human Rights Dialogue* 2/7 (Winter 2002): 20/21.

[583] The Team developed "Applying Preventive Measures: A Manual for United Nations Practitioners in Situations of Potential Conflict." http://www.reliefweb.int/unpm/.

minorities. Most international regimes dealing with minority protection are part of non-minority-specific regional and international instruments and mechanisms, including the quasi-judicial UN human rights treaty-monitoring bodies. While several human rights mechanisms indirectly cover issues of minority concern, there is no mechanism established that is dedicated to addressing violations of the rights of persons belonging to minorities and handling individual or group communication. No UN body's tasks includes following up on minority issues in a specialized and systematic way through fact finding missions and contacts with governments and society. This leaves the UN with a limited capacity to effectively assist in preventing ethnic or minority-related conflicts.[584]

The annual sessions of the Working Group on Minorities (WGM) are not the right forum to promote dialogue between minorities and governments and effectively address ethnic disputes. The weak mandate and resources of the WGM does not allow for the committee to issue recommendations, pursue investigations, or visit countries. Visits by the WGM were limited to cases where governments invited the Working Group to review examples of good practice. Furthermore, while minority representatives are allowed to take part in the sessions, insufficient participation by governments in the WGM does not allow for the WGM to take an active role as a mediator in ethnic conflicts. Active mediating roles as well as visits to countries with unresolved issues or the potential for conflict are equally necessary. This could be achieved by the expansion of the mandate of the WGM, the creation of a pro-active unit within the OHCHR, or the appointment of a special rapporteur/representative.[585] At its seventh session in 2001, the WGM called for a Special Representative on Minorities at UN headquarters to assist in identifying situations that could lead to conflict and to provide the necessary assistance to states.[586] This request is strongly supported by the NGO Minority Rights Group International.[587]

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[584] Report of the High Commissioner for Human Rights, Specific Groups and Individuals: Minorities, UN Doc. E/CN.4/2004/75, paragraph 35.

[585] HADDEN, International and National Action, paragraph 49.

[586] Report of the Working Group on Minorities (2001), UN Doc. E/CN.4/Sub.2/2001/22, paragraphs 150 and 158 (16).

[587] Possible New United Nations Mechanisms for the Protection and Promotion of the Rights of Minorities, UN Doc. E/CN.4/Sub.2/AC.5/2003/WP.3.

The major problem of UN approaches is that they are based on the presumption that "one size fits all".[588] As seen in Chapter 1 of this study, ethnic conflict can have several causes and vary in character. Consequently, approaches to solving ethnic conflicts need to be multidimensional and context-specific. Generalized approaches are problematic because each case reveals different levels of conflict intensity, duration, and actors involved. Implementation of a peace agreement requires addressing grievances, fears, and confidence-building.

Involvement by the international community whether before, during, or after the conflict, and by coercive, non-coercive, or mediatory means, can substantially contribute to the resolution of an ethnic conflict. However, the underlying causes and strategic dilemmas that produced the conflict in the first place might not be resolved. The UN thus failed so far to develop a realistic, effective, and meaningful plan or strategy to address human rights abuses in conflict situations.[589]

[588] HANNUM, Human Rights and Conflict Resolution, 21/22.

[589] See also KENNETH L. CAIN. "The Rape of Dinah: Human Rights, Civil War in Liberia, and Evil Triumphant." *Human Rights Quarterly* 21/2 (1999): 265-307. 294.

5. Toward Dealing Effectively with Ethnic Conflict through International Legal Instruments and Institutions

As seen in the previous chapters, international law and international institutions adopt a variety of measures and instruments to address ethnic conflict. Human rights law and organizations, especially those dealing with the right of peoples to self-determination and minority rights, play a particularly significant role in addressing ethnic issues.

The UN pursues a comprehensive approach combining a variety of human rights and conflict resolution strategies. However, as seen in the preceding chapter, the UN system of addressing ethnic conflict has several weaknesses that has led to massive failures and damaged its credibility. For a long time, human rights issues and violations have not been on the agenda of the top level UN institutions, with the exemption of the ECOSOC and the specific human rights bodies. In the past 10 years, however, there have been some signs of change. UNSG KOFI ANNAN strongly promoted human rights throughout the UN, which raised the awareness of the importance of human rights protection and its connection with conflict resolution and peace implementation. In its Resolution 1366 (2001), the UNSC invited the UNSG:

> to refer to the Council information and analyses from within the United Nations system on cases of serious violations of international law, including international humanitarian law and human rights law and on potential conflict situations arising, inter alia, from ethnic, religious and territorial disputes, poverty and lack of development and expresses its determination to give serious consideration to such information and analyses regarding situations which it deems to represent a threat to international peace and security.[590]

The UN has to react promptly to conflict situations to avoid the loss of its credibility. In the first place, human suffering and violence have to be terminated by mediation and negotiations as well as non-coercive and coercive measures. In post-conflict situations, it is crucial that the international community is keeping control over political, security, and legal matters until an agreement between the parties can be reached that ensures the prospects of durable and stable peace. The absence of adequate law enforcement and the failure to

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[590] UNSC Resolution 1366 (2001), UN Doc. S/RES/1366 of 30 August 2001.

remove criminal offenders, who use the situation of societal unrest to their advantage, can affect both the authority of the mission as well as the local population's willingness to respect the rule of law. In the worst case, this might lead to the formation of self-proclaimed "security forces" that take over law enforcement, often applying discriminatory and human rights violating rules, which threaten the safety of the local population and the international staff as well as the outcome of the mission as a whole.[591] As a consequence, the UN must improve its ability to establish the necessary legal institutions and political capacity to control the situation, such as ad hoc judicial measures and an interim administration facilitating the transformation to a system based on democratic principles and the rule of law. The inclusion of both international and local personnel in capacity building is crucial; only through a combination of both levels can compliance with human and minority rights be secured and implemented. Once sufficient security is established, the UN should focus on sustainable rather than temporary solutions in the process of reconstruction of civil and political institutions.

The fact that there is a need for improvement is not new. Several concepts and ideas exist on how the protection of minorities and intervention in conflicts could be streamlined and made more effective. These needs and ideas fall two broad categories: legal measures and political measures. The following paragraphs will give an overview of potential improvements, recommendations, and policy.

5.1 Legal Measures

As long as minority rights are a matter of international law, the relevant legal issues could and should be addressed as much as possible through judicial or quasi-judicial means. Judicial approaches facilitate a clearer and more nuanced understanding of the implication of minority rights norms. These are important means to strengthen the rule of law, address limited grievances and claims, make guarantees operative, and seek consistency of the respective regime of rights and duties. Independent expert committees such as the HRC or the CERD review the compliance with the relevant treaty. Their jurisprudence is an

[591] See HANSJOERG STROHMEYER. "Policing the Peace: Post-Conflict Judicial System Reconstruction in East Timor." *University of New South Wales Law Journal* 24/1 (2001): 171-182.

important source for clarification of concepts and the content of the rights concerned. The determination of whether the adequate and appropriate opportunities are provided to minorities, e.g., to receive education in their native language or to practice their own religion, should be made by judicial or quasi-judicial bodies. Notions such as "legitimate aim", "reasonable and objective justification", "proportionality", and so forth, are elaborated upon to a large extent by human rights courts or quasi-judicial bodies such as the HRC.[592]

A judicial body would need empowerment to apply minority rights provisions, not only involving states, but also private parties. The trend of individual criminal responsibility in international law may eventually lead towards expanding the judicial approach to human rights and humanitarian law in general.[593] An alternative to a fully judicial supervision of the implementation of minority rights would be the advisory role of judicial bodies or quasi-judicial control. A system of judicial and/or quasi-judicial supervision would favor consistency in approaching minority issues, which current instruments and institutions with weak or *ad hoc* enforcement procedures and case-by-case approaches can hardly satisfy.

The experience of the HRC interpreting Article 27 of the ICCPR shows that justiciability is dependent on the context of each case. Rights cannot be determined without context – and it is precisely the context that gives Article 27 rights their substance, form, and influence. This is crucial; judicial investigation, fact finding, and analysis are needed to determine the context and scope of the rights of ethnic groups. As long as judicial scrutiny is absent on the international level, one can hardly expect domestic bodies to investigate and enforce.[594]

The achievements of the UN human rights treaty bodies have been considerable, despite the fact that their decisions lack legally binding powers or may lead to restrictive measures against non-cooperative governments. However, there is room for improvement.[595] First, the reporting system should be reevaluated to determine if it meets the needs for

[592] PENTASSUGLIA, Minorities in International Law, 207/208.
[593] See for example LAURENCE R. HELFER and ANNE-MARIE SLAUGHTER. "Towards a Theory of Effective Supranational Adjudication." *Yale Law Journal* 107 (1997): 282-391.
[594] PENTASSUGLIA, Minorities in International Law, 207.
[595] See more detailed Ibid., 211-213.

dealing with minority issues. The current procedure is very complicated, bureaucratic, and difficult to access for representatives of minorities.

Second, the human rights treaty bodies should rely more on information delivered directly by the minorities concerned and by NGOs working in the field, in order to counter inadequate state reports. A new pattern of investigation and information processing based on the systematic availability and consideration of non-state sources would help to overcome gaps in information and inconsistencies. No NGO participation is currently allowed in UN human rights treaty bodies dealing with minority issues.[596] Closely cooperating with other actors in the international human rights forum, expert bodies should be able to assess human and minority rights compliance of member states on the basis of state and non-state sources of information. The establishment of a database and the use of modern communication could help to overcome impasses and enhance information flows.

Third, regarding the optional individual complaints procedures (e.g., before the HRC and CERD), it is important to inform minority members of their existence, of the criteria of admissibility, and of the use for minority members after the domestic remedies have been exhausted. Due to discrimination and violations of their rights, persons belonging to minorities lack education and access to resources to bring their case before an international body. Specific engagement by the UN and by NGOs to overcome this issue may help minorities to gain access to international institutions.

Fourth, the case law of the HRC is of great importance regarding the clarification and development of human rights and minority rights law. However, it has proven to be limited as a lot of cases regarding minorities are concerned with the rights of indigenous peoples who constitute a special case within minorities. Consequently, important areas such as linguistic and religious rights as well as education remain unexplored and await further clarification.

Fifth, the UN Working Group on Minorities should actively contribute and communicate with the treaty bodies, providing them with advice and expertise. It can foster stronger awareness of minority issues or should be able to report violations directly to the committees.

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[596] Exemptions are the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.

As long-term strategies for enhanced respect of human rights based on dialogue, investigation, and jurisprudence evolve, the treaty bodies play an important role in developing guidance on how to handle minority rights in an international legal context. If communities rely on solely political mediators, they risk inconsistent application of international rules. In this context, judicial institutions such as courts or the quasi-judicial UN human rights treaty monitoring bodies, offer advantages.[597] But as instruments for responses to severe human rights violations and ethnic conflict, the treaty bodies are less suitable in their present form. If a choice has to be made, monitoring the ongoing status of human rights should be favored over accounting for past abuses. The UN human rights treaty bodies have to be seconded by efforts of other human rights agencies such as the OHCHR in order to secure proper implementation of human rights provisions in the aftermath of conflicts. Monitoring of human rights in post-conflict situations is usually relatively short-term, because in most cases it is built into a peace agreement or part of a peace keeping mission. UN activities to improve the human rights situation and political stability in conflict affected countries become more effective with careful monitoring and capacity building. However, this is difficult to achieve in some cases because governments prefer technical assistance and advice and resent monitoring and critique. Human rights monitoring is designed to strengthen confidence in the peace process and the achievement of justice for the victims. In the words of the UNSG, "United Nations human rights activities must inspire public trust. Promotional activities without adequate and effective protection will not win that trust."[598]

Establishing a rule of law-based, post-conflict society requires a governing structure that enjoys both legitimacy and authority. The structure has to be based on a solid legal basis, taking into account international legal standards and the principles of good governance.[599] The failure to establish a responsive and efficient judicial system as part of a transitional

[597] RATNER, Does International Law Matter, 698.
[598] Report of the Secretary-General on the Work of the Organization, UN Doc. A/58/1 (2003), paragraph 177.
[599] See CHRISTIAN AHLUND. "Major Obstacles to Building the Rule of Law in a Post-Conflict Environment." *New England Law Review* 39/39 (2004/2005): 39-44.

administration can erode local support for the peace process as a whole.[600] Building and rebuilding faith in the rule of law after a violent conflict requires both a mental as well as a political transformation.

The training of personnel, human rights education, and the establishment of an independent judiciary should be among the first goals of a UN mission. Swift efforts to reestablish respect for law can contribute to the reconciliation process. Failures to prioritize law enforcement can undermine the credibility of the whole mission.[601] PADDY ASHDOWN, UN High Representative for Bosnia and Herzegovina until January 2006, writes about the experiences: "In hindsight, we should have put the establishment of the rule of law first, for everything else depends on it: a functioning economy, a free and fair political system, the development of civil society, public confidence in police and the courts."[602] The Brahimi Report recommended "a doctrinal shift in the use of … rule of law elements and human rights experts in complex peace operations to reflect an increased focus on strengthening rule of law institutions and improving respect for human rights in post-conflict environments."[603]

Judiciary functions in post-conflict situations are often entrusted to international military personnel on a temporary basis. This is not an ideal solution as independence cannot be guaranteed and the military personnel often lack the necessary expertise for the task. The creation of a network of "stand-by" jurists that could be deployed in conflict areas on short notice would help to overcome this impasse. Furthermore, it would facilitate the creation of a local judicial system as the international jurists could provide the locals with the necessary training to develop the capacity to run the judiciary system themselves.

Better results might also be achieved by working more closely with national institutions and representatives of minorities. The establishment of links between domestic and

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[600] See the findings of the study by WENDY S. BETTS, SCOTT N. CARLSON, and GREGORY GISVOLD. "The Post-Conflict Transitional Administration of Kosovo and the Lessons-learned in the Efforts to Establish a Judiciary and Rule of Law." *Michigan Journal of International Law* 22 (2000/2001): 371-389.

[601] See SIMON CHESTERMAN. "Rough Justice: Establishing the Rule of Law in Post-Conflict Territories." *Ohio State Journal of Dispute Resolution* 21/1 (2005): 69-98. 96/97. CHESTRMAN reviews the establishment of the rule of law in Kosovo, Afghanistan, and East Timor and concludes that the failure to recognize the importance of judicial consistency led to missed opportunities and the loss of credibility of the international community.

[602] PADDY ASHDOWN. "What I Learned in Bosnia." *New York Times*, 28 October 2002, A25.

[603] Brahimi Report, paragraph 47 (b).

international institutions could create a new international architecture in which the primary actors are domestic institutions of states – courts, legislatures, executive branches, administrative agencies – that interact quasi-autonomously with one another and with their international counterparts.[604]

Judicial approaches are however, relatively ineffective in handling claims that are connected with deep-rooted ethnic conflict and social and political problems. The case-by-case approach taken by judicial and quasi-judicial bodies dealing with minority rights is not enough to introduce the policy change necessary to solve ethnic conflicts and to respond to the problems that go with violence.[605] The UN human rights bodies must overcome the political selectivity; they must create enforcement mechanisms and compliance with their decisions; and they must broaden their agenda to effectively address problems of minorities and those affected by ethnic conflict, which requires them to work closely with emergency powers for quick and effective responses of gross human rights violations.[606] Many human rights questions include controversial aspects and are subject to policy considerations. Furthermore, there is a need for complementary approaches that provide appropriate means for addressing human rights issues and ethnic conflict in multiple situations.

5.2 Political Measures

Minority rights and, obviously, ethnic conflict are highly political issues that cannot be solved by legal measures alone. A review of the work by the African Commission on Human and Peoples' Rights observed:

> [M]inority rights often involve highly political issues: the degree of autonomy which a territorially concentrated minority may seek; the degree of funding for minority schools, cultural events, etc.; or the decision to which languages will form the official languages of the state. None of these issues are susceptible to judicial resolution, even by reference to standards

[604] Like the relationships between the domestic and the community institutions in the EU. See also SLAUGHTER, Pushing the Limits of Liberal Peace, 137-139.
[605] See PENTASSUGLIA, Minorities in International Law, 208.
[606] See ROBERTA COHEN. "Human Rights and Humanitarian Emergencies: New Roles for UN Human Rights Bodies." Refugee Policy Group, Centre for Policy Analysis and Research on Refugee issues, September 1992.4.

> established by minority instruments. Indeed, there is emerging evidence that non-judicial bodies, capable of engaging in an ongoing dialogue as to the meaning of minority and peoples' rights, and their application in particular circumstances, are better placed to resolve minority issues than formal adjudication bodies.[607]

As such, it is important that minority issues are not only addressed by judicial and quasi-judicial institutions, but also by the political UN bodies. The UN must strengthen its human rights decision-making capacity, particularly its ability for credible fact-finding, political analysis, and the development of authoritative interpretations of the content, scope, and meaning of human rights norms. There needs to be proactive engagement if the UN's limitations regarding human rights, especially in the context of conflict, is to be overcome. The office of the Secretary-General has a unique and important role to play in preventing and responding to human rights violations in ethnic conflicts. It would be desirable to involve the WGM, the OHCHR, and the UN treaty monitoring bodies in regular consultations with the office of the UNSG. A more proactive advisory role of human rights institutions in ethnic conflict resolution may lead to further initiatives of the UNGA, the member states, regional organizations, and NGOs.

There is scope for both human rights diplomacy and human rights advocacy. Proactive engagement is inherent to the idea of the promotion of human rights. However, it has to be pursued carefully with due respect for sovereignty of states and with regard to the special needs of the actors involved. While there can be advancement and unification on the normative and interpretative level, human rights based missions have to be based on a case-by-case approach.

There is a need for a strategic mobilization and coordination of institutions and interaction on the international level in order to effectively address ethnic conflict. A flexible, team-based, and non-hierarchical strategy[608] would have to address four elements: first, it is important that international intervention in ethnic conflict needs to reach the actual conflict and its actors; second, operational control of relief efforts should be taken over by actors in

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[607] See RACHEL MURRAY and STEVEN WHEATLEY. "Groups and the African Charter on Human and Peoples' Rights." *Human Rights Quarterly* 25/1 (2003): 213-236. 236.

[608] See also ANTONIA HANDLER CHAYES and ABRAM CHAYES. "Mobilizing International and Regional Organizations for Managing Ethnic Conflict." In *International Law and Ethnic Conflict*, ed. David Wippman, 178-210. Ithaca, NY/London: Cornell University Press, 1998. 209/210.

the field in order to avoid misunderstandings and weak policy analyses; third, the goals of the intervention, if military or non-military, should be realistic; and fourth, the method used should focus on inclusion, political accountability, and credibility of international actors involved.

Several ideas exist on how these aims could be achieved. Fact-finding missions, the opportunity of a complaint mechanism for minority rights violations, and research for a better understanding of the root causes of minority problems in order to better address them were among the ideas presented in the 2004 session of the Commission on Human Rights and its Sub-Commission.[609] Other departments, especially the UNSG, have developed thoughts on how the current problems could be overcome and how the UN system of conflict resolution and human rights protection could be strengthened. Three proposals will be looked at more closely: (1) the possibility of making UN interventions and peace operations more effective through the establishment of a standing force, (2) the creation of a special position within the UN that is concerned with minority issues and ethnic conflict resolution, and (3) the opportunity to set positive incentives for states to comply with human and minority rights.

5.2.1 The Establishment of a UN Force

Three measures can help the UN increase the probability for successful peace operations. First, a thorough diagnosis of life-threatening conditions and consequences before the deployment of UN troops and frequent assessments of progress can help the UN to get a better understanding of the needs in conflict situations. Second, rapid deployment of integrated, multilateral forces combining civil and military elements can bring useful skills. These include nation-building, cultural knowledge, mediation abilities, and resource and logistics support not only for the basic needs (relief efforts) and infrastructure repairs (reconstruction), but also of societal wounds (rehabilitation). And third, intensive

[609] See the OHCHR Report of the High Commissioner for Human Rights, Specific Groups and Individuals: Minorities, UN Doc. E/CN.4/2004/75 (2004).

engagement at the international, national, and local levels can help ensure that the conflict does not reemerge and that injustices and corruption are contained.[610]

Some UN peace operations fulfill these conditions and can be considered as successes of UN intervention. These successes show that it is possible for the international community to do something about ethnic conflicts, even though their efforts do not always succeed. The Australian-led UN intervention in East Timor in 1999 to stop the fighting between pro- and anti-Indonesian forces after the East Timorese vote for independence is among the most successful engagements of the UN in ethnic conflicts. Similarly, the UN-authorized Regional Assistance Mission under the leadership of Australia has been successful in establishing peace and stability in the Solomon Islands in 2003. The UN Mission in Cyprus may have failed to prevent the partition of the island in 1974, but it was able to maintain relative peace and security. In the aftermath of the NATO intervention in Kosovo, the international community under the lead of the OSCE and the EU invested many resources and efforts in the reconstruction and prevented a significant escalation of the ethnic conflict in Macedonia. The UN Office in Burundi that was established in 1993 after a coup d'état probably prevented a genocide of a similar scale to the one in Rwanda.[611]

However, one should not forget that with the exception of Burundi, most of these conflicts took part in places that were geographically, politically, or economically significant for the Western community. Given the fact that most ethnic conflicts today take part in developing countries, it is important to establish a reaction mechanism that is not dependent on the strategic interest of power states.

With the increase of UN peace operations and the growing complexity of these operations, there have been several instances in which the lack of a rapid deployment capability has had tragic consequences and led to great problems in the field.[612] The analysis of the failures of the UN to react to ethnic conflict, human rights violations, and even genocide in Bosnia, Rwanda, and Darfour, suggests that the UN needs intervention forces

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[610] See WILLIAM B. WOOD. "Post-Conflict Intervention Revisited: Relief, Reconstruction, Rehabilitation, and Reform." *Fletcher Forum of World Affaris* 29/1 (Winter 2005): 119-132. 130/131.

[611] See http://www.reliefweb.int/ocha_ol/pub/humrep97/glregion.html.

[612] In Rwanda, for example, the genocide could have been stopped or at least contained if a force of 2,500 would have been deployed. See the Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda of 16 December 1999, UN Doc. S/1999/1257. 30.

that can deploy more quickly to be able to save more lives.[613] Article 43 of the UN Charter is the legal mechanism by which the UN could have created an on-call military force after World War Two.[614] This aim seems politically unachievable in the near future.

However, there are some other possibilities to create rapid deployment measures and/or standing forces. In the short run, governments should strengthen their standby capabilities of national forces for multinational peace operations. The United Nations Stand-by Arrangements System (UNSAS) is based on conditional commitments by member states for specified resources within the agreed response times for UN peacekeeping operations. These resources can be military formations, specialized personnel (civilian and military), as well as material and equipment. The resources agreed-upon remain on "stand-by" in their home country, where necessary preparation, including training, is conducted to prepare them to fulfill specified tasks or functions in accordance with United Nations guidelines. Stand-by resources are used exclusively for peacekeeping operations mandated by the UNSC.[615] On a logistical level, rapid deployment can be achieved by having lighter forces with less heavy, highly technological weapons that require fewer cargo flights and preparations. The downside of this approach is that shedding protective weaponry and armor would increase the casualty among interveners – a trade-off that cannot be taken easily and would lead to a decreasing willingness of states to participate in UN missions. An alternative is to pre-position troops and heavy weaponry in areas that are prone to ethnic conflict and where they are likely to be needed – today especially in Africa and Southeast Asia. Interventions could be launched from these bases, thereby serving as rapid reaction forces. One obstacle is however, that African and Southeast Asian countries might oppose the establishment of UN military bases as a form of neo-colonialism. Another daunting obstacle is the unwillingness

[613] See the Report of the Independent Inquiry, 39-41 and 55-57.

[614] Article 43 of the UN Charter reads:

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

[615] On the UNSAS, see http://www.un.org/Depts/dpko/milad/fgs2/unsas_files/sba.htm.

of states to dedicate resources and troops for those purposes that might not match with their national interests.[616]

The deployment of regional troops to assist in humanitarian emergency situations is another idea. This option has worked well in the European context, especially within the framework of the OSCE. The U.S. launched a similar project in the mid-1990s to train African forces for humanitarian intervention.[617] The idea behind it was to overcome the deadlock caused by the lack of political will by the West, as African states might be more willing to intervene in conflicts on their own continent. However, there are several shortcomings. First, the training focused on peacekeeping in post-conflict situations and did not include peace enforcement training or other skills needed to intervene in humanitarian emergencies.[618] Second, the initiative did not provide for heavy weaponry at African bases, which would have to be brought in ad hoc in case of a crisis. Third, the training focused on national units and did not include the preparation for multinational coalition operations that would be needed in case of large scale interventions.[619]

More ambitious advocates of UN rapid deployment actions suggest more global and permanent measures. Former Under Secretary-General and "founding father" of UN peace keeping operations BRIAN URQUHART, for example, suggests a small, elite, permanent UN force composed of volunteers with the task of rapid reaction to pave the way for the larger operation, for which the troops will be contributed by the member states.[620]

The Brahimi Report proposes "rapid and effective deployment capacity" with the goal of fully deploying traditional peace keeping operations within 30 days of the adoption of a UNSC resolution establishing such an operation, and within 90 days in the case of complex peacekeeping operations. The Brahimi Report recommended further that the UNSAS should be improved and several coherent, multinational, brigade-size forces and the necessary

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[616] See KUPERMAN, Humanitarian Hazard.

[617] Africa Crisis Response Initiative, founded in 1996, was transformed into the African Contingency Operations Training and Assistance in 2004. The program's goal is to increase the capabilities of these militaries in areas such as human rights, interaction with civil society, international law, military staff skills, and small unit operations. The African Contingency Operations Training and Assistance program has a growing record of supporting African militaries that have afterwards participated in peacekeeping or peace support activities throughout the continent. This program is funded by the Department of State peacekeeping operations account.

[618] See http://www.globalsecurity.org/military/agency/dod/acri.htm.

[619] KUPERMAN, Humanitarian Hazard.

[620] BRIAN URQUHART. "Whose Fight Is It?" *New York Times*, 22 May 1994, A14.

enabling forces be created by the UN member states. To support such rapid and effective deployment, a revolving "on-call list" of about 100 experienced, well qualified military officers, carefully vetted and accepted by UN Department of Peacekeeping Operations (DPKO) should be created within UNSAS. Parallel on-call lists of civilian police, international judicial experts, penal experts, and human rights specialists should be available in sufficient numbers to strengthen the rule of law institutions as needed, and should also be part of UNSAS. Pre-trained teams could then be drawn from this list to precede the main body of civilian police and related specialists into a new mission area, facilitating the rapid and effective deployment of the law and order component into the mission. Member states should establish enhanced national "pools" of police officers and related experts, earmarked for deployment to United Nations peace operations, to help meet the high demand for civilian police and related criminal justice/rule of law expertise in peace operations dealing with intra-State conflict. Regional partnerships and programs should be set up for the purpose of training members of the respective national pools in the United Nations civilian police doctrine and standards. Regarding the financial resources, the Brahimi Report recommended the responsibilities for peacekeeping budgeting and procurement be moved out of the Department of Management and placed in DPKO. The amount of US$ 50 million should be provided to ensure that the rapid deployment can be properly financed.[621]

Regarding human and minority rights violations, human rights field operations within the UN peace mission should be strengthened. UN human rights field operations serve several different purposes.[622] First, even a small number of foreign observers have a decreasing effect on human rights violations. Second, the direct knowledge of conditions on the ground has proved helpful in clarifying the needs of the population, the nature of the abuses, and the underlying causes of conflict. This knowledge can be used in further processes such as trials of perpetrators before domestic and international courts. Third, verification of abuses and monitoring of a post-conflict situation by international personnel can influence the peace process in a positive way, as it happened in El Salvador or Guatemala. Fourth, UN human rights field operations can engage in the training of the police and members of the justice system. Fifth, UN field operations are able to facilitate the

[621] Brahimi Report, Chapter III.
[622] See very generally NYGREN KRUG, Genocide in Rwanda, 192-194.

return of refugees and internally displaced persons by providing information, food and shelter, as well as mediation between the refugees and the population remaining in the territory (usually of the same ethnic group as the perpetrators). Finally, UN field missions can serve as communication points for local and international NGOs and civil society in general that are concerned with institution-building and developing a human rights culture.

The UN faces a severe dilemma: it should play the role of the police force and "relief-and-rescue service"[623] for the world, but it is not able to take on this role for two reasons. First, the UN was not designed as a "relief-and-rescue service". The UN was created in the spirit after the Second World War "to save succeeding generations from the scourge of war" and "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom."[624] In order to be able to respond to current challenges such as genocide, ethnic conflicts, and other human rights issues, the UN has to reform itself significantly. First steps have already been taken; the establishment of the Human Rights Council replacing the Commission on Human Rights, the High Level Panel Report, and the continuing UNSC involvement in ethnic conflict issues point to a slow and small, but steady development of the UN towards its new role.

The second reason that the UN cannot take on the role of delivering relief in ethnic conflicts and rescuing suppressed minorities, is the fact that member states lack the will to contribute to peace operations. The dramatic expansion of the number of peacekeeping troops needed, in combination with a severe financial crisis in the early 1990s, led to a diminishing enthusiasm by the member states for UN peace efforts.

[623] See URQUHART, Whose Fight Is It.
[624] Preamble of the UN Charter.

5.2.2 A Special Body for Minorities

A second idea is the creation of a special position for minorities, namely the appointment Special Rapporteur (SR), reporting to the sub-commission, a Special Representative of the UNSG (SRSG), reporting directly to the UNSC, or a Special Advisor (SA) on minorities to the UN High Commissioner for Human Rights. This person and affiliated staff would have the task of facilitating the information exchange and coordination between the UN human rights programs and the UN political organs, agencies and NGOs. The institutional affiliation depends on the mandate of the position and internal UN considerations. An SRSG and SA can offer good offices and engage in preventive diplomacy, whereas the role of an SR is usually to conduct studies and gather information about a certain topic and report his or her findings to the commission. From a perspective of minority protection, the appointment of an SRSG would be the most favorable decision. An SRSG would not only be able to offer good offices, but would also report directly to the UNSC and thus could exercise the most influence, because ultimately, it is the UNSC that holds the real power for effective measures against ethnic conflict and gross human rights violations. In the following paragraphs, I will use the abbreviation SRM to refer to all three possible positions as they all are built upon the same premises and would have similar goals. Furthermore, as the following paragraphs are speculation and recommendations, I will start from the best possible outcome from a point of view of minority protection, namely a position whose mandate includes the possibility of offering "good offices".

An SRM could coordinate information about situations involving minorities at risk and could thus overcome the problem that UN human rights bodies are not designed to provide early warning and information on violations to the UN security and political bodies. Furthermore, the appointment of an SRM could provide the UN with a body concerned with minorities and ethnic conflict. As mentioned before, the only other minority specific body, the Working Group on Minorities, has a very weak and specific mandate that is not designed to deal with ethnic conflict or minority rights violations. An SRM could second the efforts of the WGM, while concurrently engaged in fact finding, diplomatic "good offices", and negotiations in ethnic conflicts, thus taking a proactive role in solving minority issues.

The role and mandate of an SRM could be shaped along the lines of the UN Special Advisor to the Secretary General on the Prevention of Genocide. The position was

suggested in early 2004 and established in July 2004.[625] The mandate focuses on prevention in relation to "genocide or related crimes". Consequently, the Special Advisor can become involved in situations preceding genocide, including situations that involve the risk of ethnic cleansing and gross violations of human rights. This is significant when considering the reluctance of states and international bodies in using the term "genocide" to describe a situation involving ethnically motivated mass killings. The mandate specifically excludes that the Special Advisor determines if a situation constitutes genocide within the meaning of the Genocide Convention. The function of the Special Advisor is not to prosecute, judge or punish, but to focus on concrete conditions and issues to enable the UN to act in a timely fashion.[626]

The Special Advisor has to develop a sensitive but determined approach. The mandate states that "[t]he methodology employed would entail a careful verification of facts and serious political analyses and consultation, without excessive publicity."[627] This shows a shift in the UN policy away from the human rights based "naming and shaming" approach towards a more direct intervention. The verification of facts within the mandate includes the possibility for the Special Advisor to conduct fact finding missions, and the consultation could take the form of negotiations and quiet diplomacy. These tasks require the Special Advisor to be independent, impartial, consistent, and a person of integrity, with the aim of building trust among states, minorities, and within the UN human rights system alike.

However, financial shortage and the lack of political commitment by the member states once again made the establishment of the position difficult. As a result, the current Special Advisor holds a part-time position (40%) and his office has two staff members (one DPA, one OHCHR). The discrepancy between resources allocated and tasks at stake is obvious.[628]

The main purpose of appointing an SRM is to support the largely reactive function the UN system regarding human rights and ethnic conflict by a pro-active, action-oriented

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[625] Outline for the mandate of the Special Advisor on the Prevention of Genocide, UN Doc. S/2004/567. The first Special Advisor is the Argentinean human rights lawyer and former political prisoner Juan E. Mendez. The position was originally designed for a Special Representative, reporting directly to the UNSC. Due to internal concerns in the DPA and the OHCHR, the ultimate appointment was the somewhat lower status of a Special Advisor who is reporting to the UNSG, and through the UNSG to the UNSC.

[626] Ibid.

[627] Ibid.

[628] See more detailed ERIK FRIBERG. "Genocide Prevention: The Potential of the Special Advisor to the Secretary-General." *Human Rights Tribune des droits humains* 11/2 (April 2005): 1-10. 3.

position. In order to achieve this, the SRM needs to be equipped with appropriate human and financial resources. NGOs, which often have a broad knowledge of certain issues, can contribute by offering independent analysis on matters that might help the SRM to gather information. Individual experts may provide advice.

An SRM could address all the questions of violations that the WGM is unable to. This can include the reception of communications by individual or groups reporting violations of their rights, investigations and fact-finding, country visits, requests for clarification by the government, and the recommendation of measures. An SRM could additionally offer good offices and take a preventive diplomacy role. As the SRM would be based in New York rather than Geneva, he/she could connect the human rights bodies (Geneva) with the conflict resolution bodies (New York) and thus facilitate coordination between human rights bodies, the UNSG, the UNSC, and the DPA.[629] Furthermore, through the SRM, the UN human rights field presence could directly report to the office of the UNSG or the UNSC on matters that would be considered gross human rights violations and/or threats to international peace and security.

The mandate of an SRM should thus include:

- Identification of different kinds of minorities and the different needs they have;
- Preparation of guidelines and models for dealing with specific issues and elaborating examples of good practice;
- Development of flexible procedures to encourage direct discussions and round table negotiations (human rights diplomacy);
- Encouragement for the creation of new regional and sub-regional bodies to develop these procedures on a more general basis.

For the SRM to be effective, several factors have to be considered.[630] First and most obviously, the UN has to play a significant role in the peace process. Second, the SRM has to be well supported by the UN headquarters and by the UNSG in particular. This support is crucial not only for the SRM's position within the wider international community, but also

[629] See also Possible New United Nations Mechanisms for the Protection and Promotion of the Rights of Minorities.

[630] See JONES, Challenges of Strategic Coordination, 96/97.

for its function as a coordinator of multiple UN departments and agencies with the efforts of NGOs and local and regional actors. Third, the timing of intervention by the SRM in the conflict is crucial for success. If an SRM intervenes after the beginning of the negotiation process, his/her ability to influence and shape the process itself as well as the outcome can be limited. Finally, the ability of the SRM to ensure effective coordination is also a function of the degree to which coordination is part of its mandate. The SRM's mandate should stress the importance of coordination.

Another possibility is the establishment of a commission dealing with peacebuilding and post-conflict reconstruction. The UNSC and UNGA decided to establish a Peacebuilding Commission in the aftermath of the World Summit in September 2005.[631] The main purposes of such a commission would be to bring together all relevant actors, to advise on strategies for post-conflict peace building and recovery, to provide recommendations for coordination of all actors involved, and to develop best practices.[632] The commission is supposed to have a standing organizational committee responsible for developing rules and working methods. This committee should comprise seven members of the UNSC, seven members of the ECOSOC, five providers of assessed contributors to UN budgets, five top providers of military personnel and civilian police in UN peacekeeping missions, and seven additional members representing all regions.[633] Furthermore, the commission should also hold country-specific meetings in which representatives of the country under consideration, mediating states, UN personnel, and regional organizations should participate.

However, there are several disadvantages that go along with the establishment of the Peacebuilding Commission vis-à-vis the appointment of an SRM. First, the commission is more bureaucratic and thus not as effective in taking over the tasks provided by its mandate. Second, the commission would not be able to offer good offices, a very important factor to strengthen the UN preventive action scheme and to overcome current shortages. Third, the commission would never have the same impartiality as an SRM. The fact that the commission consists of state representatives who stand for their home state's national interest might lead to a reluctance of conflict states to cooperate with the commission.

[631] UNGA Draft Resolution on the Peacebuilding Commission, UN Doc. A/60/L.40 (2005).
[632] Ibid., paragraph 2.
[633] Ibid., paragraph 4.

Fourth, many of the countries in the commission will be Western states, which might be interpreted as another attempt of "Western imperialism" to impose Western rule since most conflicts today take place in developing countries. And finally, while strengthening the UN conflict resolution activities, the commission would not be specifically dealing with minority issues and ethnic conflict. Thus, one of the major goals, namely the establishment of a specific position addressing the needs of ethnic groups, would not be reached. Nevertheless, the establishment of the Peacebuilding Commission is a step in the right direction and underlines the importance of peacebuilding and human rights issues today.

The international community must be prepared to commit all available resources, including a full range of political, diplomatic, and military instruments, to deal with violence and the settlement of conflict. Such a comprehensive list is beyond provision of any single state or even a group of states. One option to achieve this goal would be the establishment of an "international crisis management fund" into which each state commits a portion of its defense budget. Another option is to assign certain tasks such as fact finding, human rights monitoring, and good offices techniques to regional organizations and NGOs.[634] This would also help to overcome the issue of insufficient commitment by the states. Regional actors often have a greater interest to end a conflict and are thus willing to contribute more resources to achieve this goal.

5.2.3 Positive Incentives

The more complex and difficult the conflict environment, the greater is the probability of failure in the conflict resolution process. The UN needs to improve its strategy of strategic and political analysis of the conflict situation. UN mediators need to set incentives for conflicting parties to implement an agreement according to international standards. One possibility is to implement a system based on conditionality, for example membership in an international organization or other benefits will only be granted if the state complies with international human rights standards.

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[634] See DAVID CARMENT and PATRICK JAMES. "The United Nations at 50: Managing Ethnic Crises – Past and Present." *Journal of Peace Research* 35/1 (January 1998): 61-82. 78/79.

European institutions increasingly connect membership with a coherent human rights policy of applying states. Records show that substantial improvement has been made through this "conditional" approach, especially by Eastern European countries which are now members of the COE and the EU (or negotiating membership). New constitutional and legislative provisions and ad hoc mechanisms provide minorities in those countries with an embracing protection at the domestic level. For instance, EU action has been particularly influential in passing legislation which grants minority education and the use of minority languages, especially in Slovakia, Romania, and the countries of the former Yugoslavia.[635]

However, one should not forget that this could lead to "double standards", as not all of the Western European Countries have ratified the Framework Convention or investigate their own minority related laws. Moreover, there is no independent and permanent human rights monitoring body in this context, which may undermine the credibility of the supervision in the long run. Responsibility for action rests with political bodies and judicial control is limited as these bodies have no obligation to act in case of violations.[636] If such a policy is adopted by the UN, there needs to be an independent human rights monitoring body. This could be assumed by the OHCHR or by the WGM, if its mandate would be expanded in that direction.

The policy of positive incentives was most recently adopted by the creation of the new UN Human Rights Council. Membership in the Council is dependent on the human rights records of the state. Countries with the worst human rights records cannot run for election, and the campaigns of countries running highlight the contribution that these states would make in promoting and protecting human rights. The recent elections show that states with the worst human rights records have been defeated and that this policy could be promising.[637] All Council members are required to cooperate with UN human rights investigators who will review the human right records of the member states. The members

[635] See more detailed PENTASSUGLIA, Minorities in International Law, 216-218.

[636] See also GAETANO PENTASSUGLIA. "The EU and the Protection of Minorities: the Case of Eastern Europe." *European Journal of International Law* 12 (2001): 3-38. 22/23, 27-29, and 37.

[637] The elections were held on 9 May 2006. Countries with bad human rights records could not be elected, including recent commission members Sudan, Zimbabwe, Libya, Syria, Vietnam, Nepal, and Egypt, and others of the worst violators, including North Korea, Burma, Uzbekistan, Turkmenistan, Belarus, and Ivory Coast. A handful of politically powerful violators were elected, including China, Russia, and Cuba. But major oil producers such as Iran, which has a very poor human rights record, and Venezuela, which declared it was not bound by the council's new standards, were defeated.

of the Council can be suspended for serious human and minority rights violations. Furthermore, the new council will have a greatly enhanced ability to address human rights violations. It will meet at least three times a year, can easily call special sessions, and is required to periodically review the human rights records of all UN member states, including the most politically powerful. The council also has the strong mandate of its creation by a near-unanimous vote of the UNGA on March 15, 2006. Human Rights Watch states: "The new members must seize this historic opportunity to shape a council that will make full use of these tools for the advancement of human rights and protection of victims."[638]

5.3 Conclusion

At least five lessons can be learned UN involvement in human rights and ethnic conflict resolution. First, the creation of more judicial approaches would clarify the concepts of minority rights. Enhanced access for ethnic groups and the admission of other actors such as NGOs would contribute to the effectiveness and outreach of the UN treaty monitoring bodies. However, it is important to acknowledge that rights to not stand in a political vacuum or in isolation to other rights, and that thus they must always be considered in a contextual interpretation. Neither the purely judicial approach nor political considerations alone are enough to address human rights and minority rights issues.

Second, greater country and situation specific knowledge could be gained by having more local representatives and the establishment of standing capacities for investigations, field support, human rights education and capacity building, and advice and assistance regarding transitional justice, the rule of law, and human rights.

Third, the UN needs better coordination and information management. Coordination and communication between different bodies, the operating units in the field and the headquarters, and the human rights bodies in Geneva and the political bodies in New York need to be enhanced, and bureaucratic information flows need to be eased. The streamlining of information, political analysis, and rapid deployment measures could enhance the UN's potential to react to ethnic conflict and human rights violations. A minority rights leadership

[638] See *Human Rights Watch*, U.N.: New Council Must Champion Fight for Rights, 10 May 2006.

role for an SRM for minorities would enhance coordination between Geneva and New York. Closer partnership with NGOs could contribute to fact finding and information gathering. NGOs should be allowed to take part in the sessions of the UN treaty bodies, at least with advisory status. Their expertise and information could contribute significantly and would enhance the UN's capability for political analysis.

Fourth, an effective early warning and rapid reaction mechanism needs to be established. The question the UN should answer regarding engagement in ethnic conflict is not if it should get involved, but when and how such involvement should take place. One current problem with the UN is that it acts mostly responsively instead of preventively. If the position of the SRM is established, it would significantly contribute to the UN's preventive and conflict resolution mechanism. Other approaches ranging from regional forces to a UN rapid deployment unit could ensure faster reaction to systematic gross human rights violations.

And finally and most importantly, new policies should be adopted to set positive incentives and enhance the political will of states to contribute to UN efforts. The ultimate responsibility for implementation of minority rights rests with the states. At the international level, governments are the prime decision-makers and constitute the most powerful force to bring about effective measures. Their role needs to be addressed in the context of national interests, global interdependence, and the search for regional and international stability. This is the most difficult task of all and there is no easy recipe to deal with this issue.

However, some suggestions can be made. First, human rights education, the strengthening of efforts within the UN system, and credible action can lead to public awareness which in turn can lead to pressure on states to contribute to international action. Good reporting, well-argued opinion, and in particular real time transmission of images of suffering generate both domestic and international pressure to act ("CNN effect"). However, this only works for "new" conflicts or conflicts in areas of strategic interest of major powers. Given the fact that many ethnic conflicts are going on for years and take place in "far away" places such as the Democratic Republic of the Congo or Burma, media attention is not very effective.

Second, international NGOs have been significant advocates of cross-border human protection action, extending in some cases to military intervention. Furthermore, they have

significant influence and lobbying powers in Western countries. However, competition among different NGOs, divisions over which precise policy course is optimal, and reluctance to endorse coercive measures can limit NGO influence.[639]

Third, positive incentives and conditional benefits can contribute to state compliance with international standards. The UN should reward non-violent movements rather than armed rebellions. As long as ethnic groups live with the belief that violence will be the means to achieve their goal, strategic behavior trying to attract international attention will dominate ethnic conflicts.

Fourth, even small steps count. Given that the application of military force should remain an option of last resort, there is still a range of choices between doing nothing and sending in the troops. There are always options to be considered before, during, and after ethnic conflicts. The Report of the International Commission on Intervention and State Sovereignty concludes: "Both policy makers and humanitarian advocates would like to see public policy succeed in tackling the most crucial issues of the day. One of the most pressing of such issues is how to make good the responsibility to protect those facing the worst sort of horrors the contemporary world has to provide."[640]

And finally, the development of guidelines and examples of good practice might attract the interest not only of other minority groups, but also of governments. Fields for discussion would include: (1) procedures of dialogue between minorities and governments, the role of international institutions facilitating the dialogue, and examples of good practice such as the OSCE High Commissioner on National Minorities; (2) the possibilities for constitutional or legislative recognition with examples of national constitutions and assessments of their impact; (3) rules for deciding on membership, an analysis of different methods, and the discussion of crucial issues like multiple identities and identity politics; (4) an analysis of various possible mechanisms for effective participation of representatives of minorities at the national level, including an analysis of different voting systems and types of autonomy; (5) the importance of fair participation of minorities in public bodies and in public administration, including systems for monitoring, for dealing with under-representation, and for operating quotas; (6) different approaches to education for minorities, both regarding

[639] See also Responsibility to protect, paragraphs 8.21-8.23.
[640] Ibid., paragraph 8.23.

separate and integrated schooling and the regulation of the content of the curriculum; (7) the impact of discrimination and exclusion in employment and other social spheres; and (8) the impact of nationally and internationally sponsored development programs for minorities and especially indigenous peoples and possibilities for consultation and participation of minorities in these decisions.[641]

The promotion of human rights is, of course, only one aspect of ethnic conflict resolution. However, it should serve as an important measure of the success of actors involved in ethnic conflict resolution missions and of the quality of the "peace" itself.[642] The extent to which human rights bodies use their authority to address humanitarian and human rights emergencies will ultimately determine whether they become relevant to the UN's handling of these crises or whether they remain marginal players.

Unless the UN succeeds in communicating its message on a global level and getting people to call upon their governments to act in accordance with the UN Charter, it will never be able to break away from its dependence on world politics and the interests of the main powers.[643]

[641] See more detailed HADDEN, International and National Action, paragraph 65.

[642] See BERTRAND G. RAMCHARAN. *The International Law and Practice of Early-Warning and Preventive Diplomacy: The Emerging Global Watch*. Dordrecht: Martinus Nijhoff, 1991. 4.

[643] See BERTRAND G. RAMCHARAN. "Early Warning in UN Grand Strategy." In *Early Warning and Conflict Resolution*, ed. Kumar Rupesinghe and Michiko Kuroda, 179-198. New York: St. Martin's Press, 1992. 184.

Conclusion

"Utilizing the power of the law, to prohibit and
punish, as well as the power of education and information,
to enlighten and persuade."
Letter of CERD Chair[644]

Judge LEARNED HAND said at the ceremony to swear in 150,000 new U.S. citizens in the Central Park in New York in 1944: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it."[645] Liberty, equality, non-discrimination, and respect of basic human rights should lie at the heart of every domestic and international order. Without the satisfaction of these basic principles, human beings will struggle for their rights, in some cases using violence. Minorities are in many cases in vulnerable positions as they are denied even basic human rights, and they do not have access to political power. As a consequences, ethnic groups rebel, protest, and fight each other.

It has been the purpose of this study to show how international law and institutions can contribute to ethnic conflict resolution. The previous chapters showed points of contact, strengths, and weaknesses of international legal approaches, challenges and opportunities of the UN, and gave some input for potential improvements. The central task for the international community is to develop more responsibility toward the prevention, management, and resolution of deadly ethnic conflict.

The variations in the nature, number, size, and distribution of minorities make it clear that there is a need for differentiated approaches to the implementation of principles of minority rights on the national, regional, and international level. The response to ethnic conflict and minority issues involves a combination of means which should distinguish between concentrated as opposed to dispersed minorities, small as opposed to large minorities, those living in rural as opposed to urban areas, and those adopting an indigenous, traditional lifestyle as opposed to modernized minorities.

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[644] Letter from the Chairman of CERD in response to a request for information from the UNSG in pursuance of CRH Resolution 1993/24, paragraph 7.
[645] LEARNED HAND. "The Spirit of Liberty." Cited in CHESTERMAN. Rough Justice, 96.

Regarding an international human rights approach to ethnic conflict, four conclusions can be drawn.

Recognition and promotion of minority rights and elimination of human rights abuses. The first and most basic principle is the recognition and protection of minorities. This includes freedom from negative ethnicity-driven discrimination and the establishment of institutions that facilitate the protection and preservation of an ethnic group's identity and traditions. The right to identity stands out as the overarching guarantee combining minority rights. Specific guidelines for recommendations can be derived from various international instruments, especially the ICCPR, ICERD, and the UN Minority Declaration. Together, these instruments hold the minimum standard and rules for peaceful coexistence and constructive cooperation among members of different ethnic groups.

The absolute understanding of state sovereignty has to be replaced by a more flexible model that allows for a broad human rights approach to ethnic conflict and minority issues. UNSG KOFI ANNAN stated in his annual report to the UNGA in 1999 that "[s]tate sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation." In this context, he sees "[t]he [UN] Charter [as] a living document, whose … very letter and spirit are the affirmation of those fundamental human rights." He concludes that we live in "an era when strictly traditional notions of sovereignty can no longer do justice to the aspirations of peoples everywhere to attain their fundamental freedoms."[646] And DAVID LUBAN argues that "there is nothing regrettable about violating the statist order in order to protect human rights; the justice and injustice of war should be assessed along the dimension of human rights protection, not state sovereignty protection and the [moral evaluation] that places states above individuals is indefensible."[647]

Regarding the quality and status of minority rights, it is important to note that although minority rights instruments are proliferating, their reach is limited both substantially and geographically. For example, the UN Minority Declaration is universally applicable but legally non-binding, whereas legally binding instruments such as the Framework Convention

[646] Secretary-General Presents His Annual Report to General Assembly. UN Press Release SG/SM/7136-GA/9596 (1999).

[647] DAVID LUBAN, "Intervention and Civilization: Some Unhappy Lessons of the Kosovo War," in *Global Justice and Transnational Politics: Essays on the Moral and Political Challenges of Globalization*, ed. Pablo de Greiff and Ciaran Cronin, 79-115. Boston: MIT Press, 2002. 90.

have only a limited geographical scope. The shift to a truly legal approach to minority issues calls for clarification and strengthening of minority rights standards through clearly stated rights and obligations. Multilateral treaties and customary law should gain a more prominent role in a system that is now dominated mainly by "soft law". More importantly, "shopping-list approaches"[648] should not substitute legally binding treaties that include legal duties. Furthermore, minority rights should not only play a role in conflict-related perspectives, but also should be seen as "normal" rights addressed to individuals belonging to certain groups. If this can be achieved, the granting of minority rights can be an effective conflict prevention strategy in multicultural societies.

The second issue of effective implementation is directly linked to the existence of an independent and effective monitoring and scrutiny body. Independent supervision is not only needed to investigate abuses, but also to resolve questions regarding the content of the provisions and the way they should be applied in practice. Effective implementation of international norms point to the core of minority protection. The traditional conflict between judicial and political approaches to supervision should be overcome by stressing the advantages of each approach in a way that both of them can appropriately serve the aim of adequate and effective minority protection.

Quasi-judicial models of supervision are crucial tools in norm interpretation and dispute settlement, thereby improving the coherence of the minority rights regime. The most important conclusions that can be drawn regarding the improvement of the compliance with minority rights standards include: [649] (1) increased access to information for all parties involved – minorities and states alike; (2) increasing the use of non-traditional sources of information such as reports of NGOs and participation of representatives of ethnic groups; (3) increasing the efficiency and utilization of existing bodies and procedures; (4) increasing consistency and follow up capabilities, including the clarification of standards and legal criteria; (5) extending the possibilities for quasi-judicial approaches as a fundamental way to enhancing the understanding and coherence of the interpretation of norms, as well as contributing to dispute settlement. One idea is a universal treaty on minority rights along the lines of the UN Minority Declaration.

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[648] PENTASSUGLIA, Minorities in International Law, 252.
[649] Ibid., 223/224.

Accommodation of claims of ethnic groups to determine their own affairs. The issue of minority rights should be seen against the background of a continuing process of emancipation and empowerment of ethnic groups to combine the enjoyment of their own culture and the development of the group's identity with the active participation in the society of the state at large.

One of the possibilities to ensure the active preservation of the culture of territorially concentrated groups is self-government. Federalist models, cultural autonomy, and the possibility to actively engage in the state's affairs through minority participation and power-sharing arrangements provide opportunities for ethnic minorities to actively and effectively participate in the society as a whole and express their claims in a non-violent manner.

Democratic institutions and power-sharing arrangements despite their difficulties have proved to be the most successful means to overcome ethnic divides. Democracy combined with minority specific power-sharing (e.g., consociational arrangements) provides the institutional mechanisms for dispersed and territorially concentrated ethnic groups and minorities to secure their rights and pursue their collective interests.

Mutual accommodation is the preferred strategy to settle ethnic conflict. The acknowledgment of the other group's right to existence, culture, and ethnic identity is a first step towards mutual recognition and accommodation of claims.

International engagement is extremely important. Ethnic conflict resolution should be backed by active involvement of international and regional organizations as well as major powers and regional leaders. International actors have many reasons for seeking conflict resolution at an early stage of an ethnic conflict. First, through active engagement and credible commitment, violations of human and minority rights of ethnic groups can be restrained or stopped. Second, the threat of regional destabilization can be diminished or avoided. Third, the economy and trade are dependent on the political stability in the country. A functioning economy and well established diplomatic relations in turn contribute to the prevention of ethnic conflict. Economic development, good governance, post-conflict reconstruction, and human rights are intertwined and mutually reinforcing.

Human rights should shape the approach taken by the international community. The United Nations must comply with human rights norms, which means neither tolerating gross violations nor committing violations itself. At the same time, human rights advocates should not demand the impossible, namely full compliance with human rights norms, in a country at or emerging from war. Furthermore, they should be aware of ongoing negotiations and carefully consider the best strategy to implement human rights standards while at the same time avoiding endangerment of peace negotiations. To be effective, third-party intervention in ethnic conflict aiming at the promotion and protection of human and minority rights must be channeled toward the establishment of local institutions capable of assuming promotion, protection, and enforcement of human rights rather than toward simply investigating and punishing violations until the mandate expires and third parties withdraw.[650]

The most important option for bringing an international law and particularly a human rights approach into ethnic conflict resolution is by fostering human rights education, standard-setting, and institution-building. Educating groups and individuals about their rights and obligations under international law can help to promote a better understanding of non-violent possibilities to express ethnic claims.

UN communication strategies and coordination between different UN agencies, the UN and other organizations, and the UN headquarters and field missions have to be strengthened. The development towards a coherent system of minority protection and ethnic conflict resolution within the United Nations system can only be achieved if the historical disconnection between the UN human rights bodies in Geneva and the UN political bodies in New York can be bridged. The appointment of a special rapporteur/representative/advisor on minorities would be a good strategic position to facilitate this process.

In conclusion, it is obvious that ethnic conflicts cannot be settled through law alone. Various political, psychological, and other tools are needed to complete a successful negotiation and establish peace in an ethnic conflict. However, international law could provide a framework for ethnic conflict resolution. Law and politics mutually construct and shape each other. While political approaches do not take into account the whole range of

[650] See also PUTNAM, Human Rights and Sustainable Peace, 248-250.

legal considerations, legal approaches cannot be fostered without the political context. Therefore, while acknowledging legal limitations, institutional actors concerned with supervision of minority rights should never be forced to subject their decisions to short-term political goals or political ideologies.

If faced with a political problem such as ethnic conflict, international law can contribute to determining the scope of solutions by offering options that have been used before. The study of past problems and the efforts to manage it will assist in making choices in the present. In other words, international law can contribute by offering:

> specialized historical knowledge: in this instance the knowledge about previous efforts – expressed through formal rules and principles, institutions, and actions – to inhibit the eruption of intercommunal violence and to limit the destruction once eruption has occurred and knowledge about the express or implied preferences of contemporary governments concerning relevant norms and behavior naturally incident to their enforcement.[651]

International law should not be understood in the simple formalistic sense which means "applying rules". International law should be the "language" of the dialogue – the context in which a dispute is settled. International law is not simply an institutionalized means for recording judgments, but a means to influence the policy choices of states and thus increase the predictability of the behavior of states. In this context, international law can play both a passive and an active role in ethnic conflict resolution. Passive in the way that international law constitutes a source of basic rule of the society and provides the infrastructure of the relationship between the parties. The law exists as an "advisory opinion", which shapes the red lines and parameters of mutual relations between the parties. The law can also play an active role; international customary law, international humanitarian law and human rights law laid down in various treaties and agreements create responsibilities that influence the policy choices of the actors and thus increase the predictability of the actions taken by the actors. Furthermore, the conflicting parties do not only have claims and interests, but also rights and duties under international law. These rights and duties represent the starting point of every negotiation and every settlement. The goal of negotiation in an ethnic conflict is to reach an equitable and durable solution, not perfect justice.

Sustainable prevention and resolution of ethnic conflict requires the development of practical ways for individuals and groups to peacefully coexist and, with time integrate

[651] FARER, Conclusion, 334.

voluntarily on the basis of shared values and interests in a manner and to a degree acceptable for all.[652] The international legal framework can contribute to this aim by developing the practical tools to close the gap between early warning, responsive action, conflict resolution and peace-building and post-conflict reconstruction. Both regarding the legal basis and the institutional framework, there remains much room for improvement, especially concerning coordination, information and analysis structures. The suggestion in this study is that a coherent international legal approach to ethnic conflict will not take the form of a comprehensive theory or a new legal class such as human rights law. It will consist of a set of norms and practices coming from human rights law, humanitarian law, and international criminal law that form the basis for approaching ethnic conflict. It will involve awareness of the uniqueness of situations and issues at stake in each case and thus has to be flexible both in structure and in efforts of implementation. International law does not provide specific solutions, but it can provide a palette for institutional redesign and act as a guide to overcoming ethnic conflict.

[652] See ERIK FRIBERG. "Minority Protection through Genocide Prevention: Bridging the UN Human Rights and Political Organs." Unpublished paper, 2005.

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[653] All internet sources were accessed in June 2006.

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